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BIENNIAL REPORT
OF THE
ATTORNEY-GENERAL
OF THE
STATE OF NORTH CAROLINA

1922-1924

JAMES S. MANNING
ATTORNEY-GENERAL

FRANK NASH
ASSISTANT ATTORNEY-GENERAL

RALEIGH
EDWARDS & BROUGHTON PRINTING COMPANY,
1924

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ASSISTANT ATTORNEY-GENERAL

PRINTED
BY THE
1924

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LIST OF ATTORNEYS-GENERAL SINCE THE ADOPTION OF THE CONSTITUTION IN 1776

	<i>Term of Office</i>
Avery, Waightstill	1777-1779
Iredell, James	1779-1782
Moore, Alfred	1782-1790
Haywood, John	1791-1794
Baker, Blake	1794-1803
Seawell, Henry	1803-1808
Fitts, Oliver	1808-1810
Miller, William	1810-1810
Burton, Hutchins G.	1810-1816
Drew, William	1816-1825
Taylor, James F.	1825-1828
Jones, Robert H.	1828-1828
Saunders, Romulus M.	1828-1834
Daniel, John R. J.	1834-1840
McQueen, Hugh	1840-1842
Whitaker, Spier	1842-1846
Stanly, Edward	1846-1848
Moore, Bartholomew F.	1848-1851
Eaton, William	1851-1852
Ransom, Matt. W.	1852-1855
Batchelor, Joseph B.	1855-1856
Bailey, William H.	1856-1856
Jenkins, William A.	1856-1862
Rogers, Sion H.	1862-1868
Coleman, William M.	1868-1869
Olds, Lewis P.	1869-1870
Shipp, William M.	1870-1872
Hargrove, Tazewell L.	1872-1876
Kenan, Thomas S.	1876-1884
Davidson, Theodore F.	1884-1892
Osborne, Frank I.	1892-1896
Walser, Zeb V.	1896-1900
Douglas, Robert D.	1900-1901
Gilmer, Robert D.	1901-1908
Bickett, T. W.	1909-1916
Manning, James S.	1917-

LETTER OF TRANSMITTAL

STATE OF NORTH CAROLINA,
DEPARTMENT OF ATTORNEY-GENERAL,

RALEIGH, December 1, 1924

*To His Excellency, CAMERON MORRISON, Governor,
Raleigh, N. C.*

DEAR SIR:—In compliance with sections 6098-6099, Con. Stat., 1919,
I herewith submit the biennial report of this department for the years
1922-1923 and 1923-1924.

Respectfully submitted,

JAMES S. MANNING,
Attorney-General.

LETTER OF TRANSMITTAL

Office of Naval Research
Department of the Navy
Washington, D. C. 20340
The following information is being furnished to you for your information and use in connection with the work of the Office of Naval Research.
The information is being furnished to you for your information and use in connection with the work of the Office of Naval Research.
The information is being furnished to you for your information and use in connection with the work of the Office of Naval Research.

EXHIBIT I

CIVIL ACTIONS DISPOSED OF OR PENDING IN THE COURTS OF NORTH CAROLINA AND THE FEDERAL COURTS

DISPOSED OF IN THE SUPREME COURT OF NORTH CAROLINA

Long v. Watts, 183 N. C., 99.
Carpenter v. State Highway Commission, 184 N. C., 400.
Person v. Watts, 184 N. C., 499.
Corporation Commission v. Manufacturing Co., 185 N. C., 17.
Road Commission v. Highway Commission, 185 N. C., 56.
Latham v. Highway Commission, 185 N. C., 134.
Corporation Commission v. Railroad, 185 N. C., 435.
School Committee v. Board of Education, 186 N. C., 643.
Automotive Association v. Sheriff, 186 N. C., 159.
Person v. Doughton, 186 N. C., 723.
Automotive Association v. Sheriff (petition denied), 187 N. C., 25.
Rhode Island Hospital Trust Co. v. Doughton, 187 N. C., 263.
Corporation Commission v. A. C. L. Ry. Co., et al., 187 N. C., 424.
Norfolk Southern v. Lacy, Treas., 187 N. C., 615.
Board of Education v. Board of Co. Commissioners, 187 N. C., 710.
Bank v. Lacy, 188 N. C., 25.
Cameron v. Highway Commission, 188 N. C., 84.
Vaughan v. Lacy, 188 N. C., 123.

PENDING IN THE SUPREME COURT OF NORTH CAROLINA

Wachovia Bank & Trust Co. v. Doughton.
Attorney-General v. Railways.
Lacy v. Globe Indemnity Co.
State & City Bank & Trust Co. v. Doughton.

DISPOSED OF IN THE UNITED STATES SUPREME COURT

Railroads v. Doughton (Income Tax), 262 U. S., 413.

PENDING IN UNITED STATES SUPREME COURT

Rhode Island Hospital Trust Co. v. Doughton.

PENDING IN U. S. DISTRICT COURT FOR EASTERN DISTRICT
OF NORTH CAROLINA

Railroads v. Corporation Commission (Freight Rate Case).

Henderson Water Co. v. Corporation Commission.

Royal Indemnity Co. v. Lacy.

PENDING BEFORE INTERSTATE COMMERCE COMMISSION

Freight Rate Proceedings.

STATE CASE DISPOSED OF IN THE UNITED STATES SUPREME COURT

Campbell v. The State, 262 U. S., 728.

EXHIBIT II

LIST OF CASES ARGUED BY THE ATTORNEY-GENERAL AND ASSISTANT ATTORNEY-GENERAL BEFORE THE SUPREME COURT, FALL TERM, 1922; SPRING TERM, 1923; FALL TERM, 1923; SPRING TERM, 1924.

AUGUST TERM, 1922

1. State v. Baker, et al., from Buncombe; liquor; verdict, guilty; appeal by defendant; affirmed.
2. State v. Baldwin, from Macon; manslaughter; verdict, guilty; appeal by defendant; affirmed.
3. State v. Beam, from Cleveland; liquor; verdict, guilty; appeal by defendant; new trial.
4. State v. Bell, from Vance; abandonment; verdict, guilty; appeal by defendant; affirmed.
5. State v. Bradshaw, from Alamance; liquor; verdict, guilty; appeal by defendant; affirmed.
6. State v. Bradshaw, from Alamance; liquor; verdict, guilty; appeal by defendant; affirmed.
7. State v. Buckner, from Madison; liquor; verdict, guilty; appeal by defendant; affirmed.
8. State v. Burnett, from Polk; liquor; verdict, guilty; appeal by defendant; affirmed.
9. State v. Bush, from Caldwell; murder, first degree; verdict, guilty; appeal by defendant; new trial.
10. State v. Campbell, from Buncombe; murder, first degree; verdict, guilty; appeal by defendant; affirmed.
11. State v. Dill, from Beaufort; rape; verdict, guilty; appeal by defendant; affirmed.
12. State v. Dillingham, from Buncombe; extortion; verdict, guilty; appeal by defendant; affirmed.
13. State v. Faulkner, from Burke; liquor; verdict, guilty; appeal by defendant; affirmed.

14. State v. Flowers, from Duplin; embezzlement; verdict, guilty; appeal by defendant; new trial.

15. State v. Fuleher, from Carteret; assault on female; verdict, guilty; appeal by defendant; new trial.

16. State v. Green, from New Hanover; bastardy; verdict, guilty; appeal by defendant; affirmed.

17. State v. Grier, from Mecklenburg; liquor; verdict, guilty; appeal by defendant; affirmed.

18. State v. Harrison, from Davidson; liquor; verdict, guilty; appeal by defendant; affirmed.

19. State v. Jackson, from Polk; liquor; verdict, guilty; appeal by defendant; affirmed.

20. State v. Jenks, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

21. State v. Johnson, from Chatham; manslaughter; verdict, guilty; appeal by defendant; new trial.

22. State v. Mallard, from Brunswick; embezzlement; verdict, guilty; appeal by defendant; affirmed.

23. State v. Mann, from Buncombe, crime against nature; verdict, guilty; appeal by defendant; affirmed.

24. State v. Maynard, from Vance; storebreaking; verdict, guilty; appeal by defendant; affirmed.

25. State v. MeHaffey, from Haywood; liquor; verdict, guilty; appeal by defendant; reversed.

26. State v. Mills, from Greene; liquor; verdict, guilty; appeal by defendant new trial.

27. State v. Pulliam, from Forsyth; Sunday law; verdict, guilty; appeal by defendant; new trial.

28. State v. Presnell, from Randolph; liquor; verdict, guilty; appeal by defendant; affirmed.

29. State v. Schoolfield, from Guilford; forgery; verdict, guilty; appeal by defendant; affirmed.

30. State v. Smith, from Anson; costs; verdict, guilty; appeal by defendant; affirmed.

31. State v. Sparks, from Yadkin; liquor; verdict, guilty; appeal by defendant; new trial.

32. State v. Springs, from Union; liquor; verdict, guilty; appeal by defendant; new trial.

33. State v. Sudderth, from Burke; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

34. State v. Thomas, from Cabarrus; murder, second degree; verdict, guilty; appeal by defendant.

35. State v. Vickers, from Durham; habeas corpus; certiorari; appeal dismissed.

36. State v. Ward, from Pitt; liquor; verdict, guilty; appeal by defendant; dismissed.

37. State v. Wingler, from Wilkes; murder, second degree; verdict, guilty; appeal by defendant; affirmed.

DOCKETED AND DISMISSED

38. State v. Boston, from Washington.

39. State v. Anderson, from Lenoir.

40. State v. Chasten, from Duplin.

41. State v. Harris, from Franklin.

42. State v. Burton, from Durham.

43. State v. Newsom, from Forsyth.

44. State v. Greer, from Forsyth.

45. State v. West, from Henderson.

46. State v. Brooks, from Buncombe.

47. State v. Whittimore, et al., from Buncombe.

48. State v. Floyd, from Buncombe.

49. State v. Lloyd, et al., from Buncombe.

50. State v. Hall and Haney, from Cherokee; appeal withdrawn.

FEBRUARY TERM, 1923

51. State v. Brame, from Vance; liquor; verdict, guilty; appeal by defendant; affirmed.

52. State v. Butler, from Transylvania; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

53. State v. Dixon, from Guilford; forgery; verdict, guilty; appeal by defendant; new trial.

54. State v. Edmonds, from Forsyth; store burning; verdict, guilty; appeal by defendant; affirmed.

55. State v. Estes, from Caldwell; obstructing officer; verdict, guilty; appeal by defendant; new trial.

56. State v. Faulkner, from Vance; abandonment; verdict, guilty; appeal by defendant affirmed.

57. State v. Foster, from Franklin; liquor; verdict, guilty; appeal by defendant; affirmed.

58. State v. Foster, from Franklin; carrying concealed weapon; verdict, guilty; appeal by defendant; affirmed.

59. State v. Goode, from Rutherford; secret assault; verdict, guilty; appeal by defendant; new trial.

60. State v. Griffith, from Davie; burning other than arson; verdict, guilty; appeal by defendant; affirmed.

61. State v. Harbert, from Buncombe; larceny and receiving; verdict, guilty; appeal by defendant; reversed.

62. State v. Hedgecock, from Guilford; false entries; verdict, guilty; appeal by defendant; affirmed.

63. State v. High, from Franklin; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

64. State v. Hutchins, from Forsyth; Sci. Fa; judgment; affirmed.

65. State v. Jestes, from Avery; uttering forged instrument; verdict, guilty; appeal by defendant; affirmed.

66. State v. Journegan, from Franklin; liquor; verdict, guilty; appeal by defendant; affirmed.

67. State v. Lewis, from Vance; larceny, etc.; verdict, guilty; appeal by defendant; affirmed.

68. State v. Miller, from Lenoir; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

69. State v. Miller, from Buncombe, indecent exposure; verdict, guilty; appeal by defendant; affirmed.

70. State v. Moore, from Pitt; murder, second degree; verdict, guilty; appeal by defendant; new trial.

71. State v. Phillips, from Yancey; petition for certiorari; certiorari granted; judgment reversed.

72. State v. Potter, from Watauga; liquor; verdict, guilty; appeal by defendant; affirmed.

73. State v. Reagan, from Davidson; larceny and receiving; verdict, guilty; appeal by defendant; affirmed.

74. State v. Russel, from Iredell; abortion; verdict, guilty; appeal by defendant; affirmed.

75. State v. Sisk, from Rockingham; murder, second degree; verdict, guilty; appeal by defendant; affirmed.

76. State v. Snipes, from Caldwell; liquor; verdict, guilty; appeal by defendant; new trial.

77. State v. Spencer, from Forsyth; carrying concealed weapon; verdict, guilty; appeal by defendant; affirmed.

78. State v. Steen, from Richmond; liquor; verdict, guilty; appeal by defendant; affirmed.

79. State v. Trull, from Union; secret assault; verdict, guilty; appeal by defendant; affirmed.

80. State v. Wheeler, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

81. State v. Whisnant, from Polk; liquor; verdict, guilty; appeal by defendant; affirmed.

82. State v. Williams, from Craven; seduction; verdict, guilty; appeal by defendant; affirmed.

83. State v. Williams, from Onslow; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

84. State v. Williams, from New Hanover; rape; verdict, guilty; appeal by defendant; new trial.

DOCKETED AND DISMISSED

85. State v. Jerry Dalton, from Macon.

86. State v. Guppton, from Edgecombe.

87. State v. McLamb, from Harnett.

88. State v. Max Staton, from Lenoir.

89. State v. Davis, from Wake.

90. State v. Kennedy, from New Hanover.

91. State v. Butler, from Surry.

92. State v. Collins Kirkley, from Forsyth.

93. State v. Carl Talley, from Guilford.

94. State v. Sigsby Bennett, et al., from Haywood.

95. State v. McLean, et al., from Swain.

AUGUST TERM, 1923

96. State v. Allen, from Franklin; burglary, first degree; verdict, guilty; appeal by defendant; new trial.

97. State v. Barnhill, from Pender; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

98. State v. Bethea, from Wilson; murder, first degree; verdict, guilty; appeal by defendant; new trial.

99. State v. Biggerstaff, from Rutherford; liquor; verdict, guilty; appeal by defendant; affirmed.

100. State v. Blackwelder, from Rowan; violating town ordinance; special verdict; appeal by State; affirmed.

101. State v. Bowman, from Lee; liquor; verdict, guilty; appeal by defendant; affirmed.

102. State v. Burgess, from Anson; liquor; verdict, guilty; appeal by defendant; reversed.

103. State v. Byers, from Polk; liquor; verdict, guilty; appeal by defendant; affirmed.

104. State v. Coe, from Forsyth; larceny; verdict, guilty; appeal by defendant; affirmed.

105. State v. Edmonds, from Madison; liquor; verdict, guilty; appeal by defendant; affirmed.

106. State v. Edmonds, from Buncombe; liquor; verdict, guilty; appeal by defendant; affirmed.

107. State v. Efrid, from Stanly; assault upon female; verdict, guilty; appeal by defendant; affirmed.

108. State v. Green, from Davidson; assault with intent; verdict, guilty; appeal by defendant; affirmed.

109. State v. Gulley, from Granville; liquor; verdict; appeal by defendant; affirmed.

110. State v. Hart, from Granville; carnal knowledge of female child; verdict, guilty; appeal by defendant; new trial.

111. State v. Hasty, from Randolph, assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

112. State v. Hawley, from Richmond; perjury; motion to quash; appeal by defendant, reversed.

113. State v. Hooker, from Richmond; abandonment; verdict, guilty; appeal by defendant, affirmed.

114. State v. Hopper, from Rockingham; abduction; verdict, guilty; appeal by defendant; affirmed.

115. State v. Humphrey, from Mecklenburg; assault upon female; verdict, guilty; appeal by defendant; new trial.

116. State v. Kee, from Guilford; larceny; verdict, guilty; appeal by defendant; affirmed.

117. State v. Kelly, from Pender; road law; verdict, guilty; appeal by defendant; affirmed.

118. State v. Loftin, from Lenoir, resisting officer; verdict, guilty; appeal by defendant; new trial.

119. State v. Logan, from Rutherford; liquor; verdict, guilty; appeal by defendant; affirmed.

120. State v. Lumber Co., from Buncombe; Sunday law; verdict, guilty; appeal by defendant; affirmed.

121. State v. Murphrey, from Greene; liquor; verdict, guilty; appeal by defendant; affirmed.

122. State v. Oliver, from New Hanover; false pretense; plea in abatement; overruled; affirmed.

123. State v. Plummer, from New Hanover; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.

124. State v. Reece, from Davidson; prostitution, etc.; verdict, guilty; appeal by defendant; affirmed.

125. State v. Richardson, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

126. State v. Vaughan, from Hertford; murder, second degree; verdict, guilty; appeal by defendant; affirmed.

127. State v. Wallin, from Madison; liquor; verdict, guilty; appeal by defendant; affirmed.

128. State v. Walton, et al., from Hoke; accessories to murder; verdict, guilty; appeal by defendants; affirmed.

129. State v. Williams, from Henderson; assault upon female; verdict, guilty; appeal by defendant; affirmed.

DOCKETED AND DISMISSED

130. State v. Joe Hill, from Nash.

131. State v. Parker Thompson, from Lenoir.

132. State v. Garriss, from Lenoir.

133. State v. Lindsay Varner, from Davidson.

134. State v. Robt. Teague, from Davidson.
 135. State v. Jake Hughes, from Davidson.
 136. State v. Jess Lambeth, from Davidson.
 137. State v. Tom Crotts, from Davidson.
 138. State v. Garfield Bailey, from Harnett.
 139. State v. Joe Riley, et al., from Lenoir.
 140. State v. B. J. Peele, from Richmond.
 141. State v. J. J. Peele, from Richmond.
 142. State v. Charity Jones, from Buncombe.
 143. State v. Buddie Earwood, from Buncombe.
 144. State v. Clarence Anders, from Buncombe.
 145. State v. Norris, et al., from Columbus.
 146. State v. Dallas, from New Hanover; appeal withdrawn.
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FEBRUARY TERM, 1924

147. State v. Arrowood, from Rutherford; concealing birth of infant; verdict, guilty; appeal by defendant; new trial.
148. State v. Ashburn, from Surry; murder, second degree; verdict, guilty; appeal by defendant; affirmed.
149. State v. Baldwin, from Durham; liquor; verdict, guilty; appeal by defendant; affirmed.
150. State v. Barbee, from Cabarrus; failure to pay board bill; verdict, guilty; appeal by defendant; reversed.
151. State v. Barrett, from Anson; cruelty to animals; verdict, guilty; appeal by defendant; affirmed.
152. State v. Brooks, from Rutherford; assault with intent to kill; verdict, guilty; appeal by defendant; affirmed.
153. State v. Crutchfield, from Forsyth; manslaughter; verdict, guilty; appeal by defendant; affirmed.
154. State v. Dison, from Surry; assault with intent to commit rape; verdict, guilty; appeal by defendant; affirmed.
155. State v. Edwards, from Edgecombe; town ordinance; verdict, guilty; appeal by defendant; affirmed.
156. State v. Elkins, from New Hanover; license tax; verdict, guilty; appeal by defendant; affirmed.

157. State v. Green, from Brunswick; liquor; verdict, guilty; appeal by defendant; affirmed.

158. State v. Hayes, from Durham; larceny and receiving; verdict, guilty; appeal by defendant; affirmed.

159. State v. Hedden, from Macon; abandonment; verdict, guilty; appeal by defendant; reversed.

160. State v. Hendricks, from Durham; larceny; verdict, guilty; appeal by defendant; affirmed.

161. State v. Hightower, from Wake; banking laws; verdict, guilty; appeal by defendant; new trial.

162. State v. Levy, from Cumberland; murder, second degree; verdict, guilty; appeal by defendant; affirmed.

163. State v. Love, from Haywood; murder, first degree; verdict, guilty; appeal by defendant; new trial.

164. State v. Lowe, from Forsyth; emigrant agent; special verdict; appeal by State; affirmed.

165. State v. McAllister, from Washington; liquor; verdict, guilty; appeal by defendant affirmed.

166. State v. McCoy, from Anson; liquor; verdict, guilty; appeal by defendant; affirmed.

167. State v. Mangum, from Wake; carrying concealed weapon; verdict, guilty; appeal by defendant; affirmed.

168. State v. Melton, from Hoke; manslaughter; verdict, guilty; appeal by defendant; new trial.

169. State v. O'Neal, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

170. State v. Oxendine, from Robeson; manslaughter; verdict, guilty; appeal by defendant; new trial.

171. State v. Shepherd, from Richmond; liquor; suspended judgment; appeal by defendant; affirmed.

172. State v. Smith, from Pender; manslaughter; verdict, guilty; appeal by defendant; affirmed.

173. State v. Switzer, from Guilford; banking laws; verdict, guilty; appeal by defendant; affirmed.

174. State v. Valley, from Davidson; emigrant agent; verdict, guilty; appeal by defendant; affirmed.

175. State v. Wilkerson, from Durham; resisting officer; verdict, guilty; appeal by defendant; affirmed.

176. State v. Williams, from Durham; housebreaking; verdict, guilty; appeal by defendant; affirmed.

177. State v. Young, from Rowan; house burning; verdict, guilty; appeal by defendant; affirmed.

178. State v. Riley, et al., from Guilford; larceny and receiving; verdict, guilty; appeal by defendants; affirmed.

DOCKETED AND DISMISSED

- 179. State v. G. B. Flynn, from Forsyth.
- 180. State v. D. A. Lee, from Johnston.
- 181. State v. Berry Morgan, from Lenoir.
- 182. State v. W. R. Williams, from Lenoir.
- 183. State v. J. H. Starnes, from Forsyth.
- 184. State v. Monroe Ross, from Forsyth.
- 185. State v. Dallas Long, from Guilford.
- 186. State v. Frank Gordon, from Davidson.
- 187. State v. Roy Cauble, from Rowan.
- 188. State v. Dunningan & Charles, from Forsyth.
- 189. State v. Roy Cauble, from Rowan.
- 190. State v. R. O. Abernethy, from Catawba.
- 191. State v. Waitus Carter, from Columbus.
- 192. State v. Welch, from Macon.
- 193. State v. Wash Bryant, from Harnett.
- 194. State v. Jim Kelly, from Lee.
- 195. State v. Zack Headen, from Chatham.
- 196. State v. Forrester, from Chatham.
- 197. State v. Tom Fearington, from Chatham.
- 198. State v. Wilton Ball, from Stokes.

SUMMARY OF CASES

Affirmed on defendant's appeal	101
New trial or reversed on defendant's appeal.....	33
Affirmed on State's appeal	2
Reversed on State's appeal	1
Appeal dismissed	61
<hr/> TOTAL	198

CRIMINAL STATISTICS

STATEMENT A

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF DURING THE FALL TERM, 1922, AND SPRING TERM, 1923

County	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of
Alamance.....	111	78		181	8	159	19	9	2
Alexander.....	49	5		53	1	53	1		
Alleghany.....	15	1		15	1	14	2		
Anson.....	40	166		199	7	152	29	25	
Ashe.....	60			59	1	58	2		
Avery.....	56			52	4	40	13	3	
Beaufort.....	20	35		55		43	12		
Bertie.....	27	73		97	3	65	15	18	2
Bladen.....	23	32		46	9	55			
Brunswick.....	41	11		50	2	49	3		
Buncombe.....	352	174		474	52	371	45	107	3
Burke.....	73	38		108	3	111			
Cabarrus.....	62	28		86	4	82	5	3	
Caldwell.....	68	20		84	4	85	2	1	
Camden.....	9	4		12	1	8	1	3	1
Carteret.....	51	18		69		68		1	
Caswell.....	13	29		41	1	35	3	2	2
Catawba.....	64	18		78	4	82			
Chatham.....	78	146		215	9	154	21	37	12
Cherokee.....	59			57	2	19	6	34	
Chowan.....	9	7		16		10	5	1	
Clay.....	27	5		29	3	14	13	5	
Cleveland.....	50	18		64	4	41	13	9	5
Columbus.....	69	34		93	10	68	11	23	1
Craven.....	40	65		93	12	74	12	14	5
Cumberland.....	90	83		164	9	88	32	51	2
Currituck.....	4			4		4			
Dare.....	20	4		22	2	5	9	7	3
Davidson.....	102	50		143	9	116	18	15	3
Davie.....	37	6		42	1	30	1	12	
Duplin.....	69	93		150	12	93	28	37	4
Durham.....	163	187		330	20	242	46	52	10
Edgecombe.....	74	70		141	3	114	7	22	1
Forsyth.....	171	235		368	38	381	18	5	2
Franklin.....	21	58		78	1	71	8		
Gaston.....	243	100		316	27	269		74	
Gates.....	21	20		41		22	8	9	2
Graham.....	23			17	6	8	7	8	
Granville.....	39	70		104	5	81	22	6	
Greene.....	25	33		56	2	39	17	2	
Guilford.....	287	180		432	35	312	58	91	7
Halifax.....	32	108		135	5	140			
Harnett.....	58	34		85	7	46	26	18	2
Haywood.....	309	20		314	15	162	33	132	2
Henderson.....	107	39		138	8	88	37	18	3
Hertford.....	14	27		39	2	33	3	5	
Hoke.....	5	22		26	1	21	3	3	
Hyde.....	25	32		57		39	3	15	

STATEMENT A—Continued

County	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of
Iredell.....	32	30		56	6	45	2	15	
Jackson.....	98	5		101	2	30	8	63	2
Johnston.....	61	38		93	6	60	18	17	4
Jones.....	9	29		34	4	35	3		
Lee.....	41	56		94	3	73	14	9	1
Lenoir.....	75	99		160	14	124	24	26	
Lincoln.....	51	8		55	4	52		7	
Macon*.....	130	10		132	8	41	8	95	
Madison.....	53	2		51	4	55			
Martin.....	20	27		47		47			
McDowell.....	87	24		102	9	51	16	44	
Mecklenburg†.....	284	326		572	38	428	28	133	22
Mitchell†.....	88	3		88	3	46	3	43	
Montgomery.....	58	40		97	1	86	10	2	
Moore.....	35	46		80	1	66	7	8	
Nash.....	76	110		176	10	133	17	32	4
New Hanover.....	71	65		123	13	146			
Northampton.....	20	46		64	2	46	7	11	2
Onslow.....	34	31		65		61	4		
Orange.....	76	101		173	4	137	23	15	2
Pamlico.....	30	22		52		40	6	6	
Pasquotank.....	22	42		52	12	37	25	2	
Pender.....	36	30		63	3	49	8	4	5
Perquimans.....	15	35		47	3	27	20	3	
Person.....	26	10		36		35	1		
Pitt.....	72	162		224	10	134	49	51	
Polk.....	102	26		126	2	64	22	40	2
Randolph.....	124	35		153	6	119	9	31	
Richmond.....	113	108		212	9	133	41	47	
Robeson.....	47	40	20	105	2	79	7	21	
Rockingham.....	61	33		85	9	94			
Rowan.....	42	26		63	5	43	5	17	3
Rutherford.....	55	24		76	3	44	24	10	1
Sampson.....	70	79		140	9	116	33		
Scotland.....	11	30	9	48	2	20	9	21	
Stanly.....	5	10		14	1	15			
Stokes.....	81	19		98	2	68	10	22	
Surry.....	80	17		90	7	76	19	2	
Swain.....	91	4	5	95	5	61	33	6	
Transylvania.....	77	13		86	4	39	13	38	
Tyrrell.....	7	2		8	1	5	4		
Union.....	34	39		73		51	9	13	
Vance.....	46	45		84	7	64	15	12	
Wake.....	227	298		490	35	382	61	78	4
Warren.....	8	24		32		23	2	5	2
Washington.....	3	5		8		5	2		1
Watauga.....	82	1		78	5	54	6	23	
Wayne.....	41	40		77	4	81			
Wilkes.....	200	8		191	17	121	12	75	
Wilson.....	80	181		250	11	207	32	22	
Yadkin.....	37	11		48		46	2		
Yancey.....	52			51	1	21	8	23	
Totals.....	6,781	4,991	34	11,146	660	8,419	1,296	1,969	129

* 4 Corporations.

† 1 Corporation.

‡ 1 Corporation.

Recapitulation of Statement A

TOTAL NUMBER CRIMINAL ACTIONS DISPOSED OF.....		11,813
Males.....	11,146	
Females.....	660	
Corporations.....	7	
Total.....		11,813
White.....	6,781	
Colored.....	4,991	
Indians.....	34	
Corporations.....	7	
Total.....		11,813
Convictions, including submissions.....	8,419	
Acquitted.....	1,296	
Nolle Pros.....	1,969	
Otherwise disposed of.....	129	
Total.....		11,813

Cumberland.....	3		4	1	10	17	2				1	1
Currituck.....	2		1		2	1						1
Dare.....	7				9	12	5					3
Davidson.....	2			2		7						
Davie.....	1		1		12	26	1					
Duplin.....			3		8	31						
Durham.....	4	1	2		24	13	1			1		4
Edgecombe.....	2	9	1		3	35				3	1	2
Forsyth.....	1		2		3	24	3					
Franklin.....	5				36	8	1			3	1	1
Gaston.....	1		8		5	4						
Gates.....			4			1						
Graham.....		2			9	8						
Granville.....			2		1	10						1
Greene.....					18	26	2					1
Guilford.....	4		1		19	4	1			1		
Halifax.....	2		8		6	8						1
Harnett.....	9	1	12	2	28							13
Haywood.....			1		30							
Henderson.....	1		4		8	1						
Hertford.....			4									
Hoke.....										2		
Hyde.....						9						
Iredell.....	2		2	1	1	6						
Jackson.....	1	1		2	15	8						1
Johnston.....					4	11	1			4		
Jones.....					9	3						
Lee.....			2		16	4						
Lenoir.....					16	21	4			1		
Lincoln.....			4		1	4	1			1		
Macon.....	2	1	13		2	14						
Madison.....					2	5						
Marion.....	2		7		1	7	1					
McDowell.....	3				3	4						
Mecklenburg.....	4		5	1	33	24	5			3		5
Mitchell.....	1		5			8						
Montgomery.....			8	1	2	16	1					1
Moore.....					1	18	1			1		

Wake.....	4	3	1	10	---	11	70	2	---	5	---	2	61	15
Warren.....	1	---	---	---	---	7	3	---	---	---	---	---	1	---
Washington.....	---	---	---	---	---	1	---	---	---	---	---	---	---	---
Watauga.....	2	---	---	---	---	1	16	---	---	---	---	---	2	---
Wayne.....	---	---	---	1	---	4	1	2	---	2	---	---	1	---
Wilkes.....	3	---	---	---	---	13	31	1	---	---	---	---	---	1
Wilson.....	2	---	---	10	---	10	45	---	---	1	---	---	1	---
Yadkin.....	---	---	---	---	---	---	11	---	---	---	---	---	---	---
Yancey.....	2	---	---	2	---	2	4	---	---	---	---	---	---	---
Totals.....	142	35	6	258	17	618	1,251	58	---	48	5	2	61	15

STATEMENT B—Continued

County	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Alamance.....	15					1	9	2			1				6		8
Alexander.....	2								1			1			2		
Alleghany.....	2								2								
Anson.....	20					2	2	6	4		1		12	1	2		
Ashe.....	10								3					3			
Avery.....	5						1	3				2			5		
Beaufort.....	5										1				1		
Berrie.....	16					2		3	1				2			1	
Bladen.....	6								1					4	1		
Brunswick.....						4											
Buncombe.....	29			3			16	4	4		11				23		2
Burke.....	6						2	1	3		1	2			1		
Cabarrus.....	11														2		
Caldwell.....	10					1	4	1				1					4
Camden.....												1					
Carteret.....	3														1	13	
Caswell.....	4					4			6				2				
Catawba.....	6						2										
Chatham.....	14							7				2			3		
Cherokee.....	2					1	1	1	3			1					
Chowan.....											1						
Clay.....	5						1										
Cleveland.....	1						6										
Columbus.....	7						3	3								3	
Craven.....	1							3			5	1				3	
Cumberland.....											4						
Currituck.....	11						1	5			1	4					
Dare.....									1								

[illegible]

Watauga.....	8						4					11					
Wayne.....						1		1						2			1
Wilkes.....	8				5		17	1						1			
Wilson.....	28					2	1					1	1	4			
Yadkin.....	1						1										
Yancey.....	2						1					1					
Totals.....	782		2	18	39	171	122	145	2	129	71	23	34	202	41		31

STATEMENT B—Continued

County	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Alamance.....	2	1	1	11	—	4	—	1	—	57	16	—	—	—	—	—	—
Alexander.....	—	1	2	—	—	—	—	—	—	11	—	—	—	—	—	1	—
Alleghany.....	—	—	2	—	—	—	—	—	—	2	1	—	—	—	—	—	—
Anson.....	2	—	—	13	—	3	—	—	—	57	33	—	—	—	—	—	—
Ashe.....	3	—	3	2	—	2	—	—	—	9	4	—	—	—	—	—	—
Avery.....	—	—	—	—	—	—	—	—	—	19	3	—	—	—	—	—	—
Beaufort.....	—	—	—	—	—	4	—	—	—	4	4	—	—	—	—	—	2
Bertie.....	3	—	3	2	—	—	—	—	—	7	4	—	—	2	—	—	—
Bladen.....	—	—	1	—	—	9	1	—	—	7	6	—	—	—	—	—	—
Brunswick.....	3	2	—	—	—	1	—	—	—	5	4	—	—	—	—	—	—
Buncombe.....	3	14	10	17	—	14	—	—	2	147	62	—	—	1	4	—	1
Burke.....	6	1	1	13	—	2	—	—	—	32	4	—	—	—	—	—	1
Cabarrus.....	—	—	2	—	—	4	—	1	1	19	13	—	—	—	1	—	—
Caldwell.....	3	—	4	17	—	2	—	—	—	14	4	—	—	1	—	—	—
Camden.....	—	—	2	—	—	2	—	—	—	1	1	—	—	—	—	—	—
Cartersville.....	1	—	1	—	—	—	—	—	2	21	4	—	—	—	2	—	—
Caswell.....	—	—	2	—	—	1	—	—	—	10	1	—	—	—	—	—	—
Catawba.....	2	2	2	4	—	—	—	—	—	18	10	—	—	—	—	—	—
Chatham.....	2	2	6	20	—	14	—	—	—	91	18	—	1	—	—	—	—
Cherokee.....	2	3	—	2	—	—	—	—	1	9	5	—	—	—	—	—	—
Chowan.....	—	—	—	—	—	—	—	—	—	2	2	—	—	—	2	—	—
Clay.....	—	—	—	—	—	—	—	—	—	5	3	—	—	—	—	—	—
Cleveland.....	3	5	4	—	—	—	—	—	—	24	10	—	—	—	—	—	—
Columbus.....	—	1	6	—	—	5	—	1	—	18	11	—	—	—	—	—	—
Craven.....	—	3	—	—	—	16	—	1	—	13	17	—	—	—	—	—	1
Cumberland.....	1	1	6	—	—	—	—	1	—	25	45	—	—	—	2	—	1
Currituck.....	—	—	—	—	—	2	—	—	—	—	3	—	—	—	—	—	—
Dare.....	4	—	2	—	—	—	—	—	—	—	1	—	—	3	—	—	—

Davidson	3	3	1	9	2	3	23	31	1	1
Davie				2		3	9	3		
Duplin	6	3		2			21	29	1	
Durham	5	4		17		5	59	94	4	
Edgecombe	2	3		8			18	19	1	
Forsyth	2	5		23		2	85	90	2	
Franklin	2			2			7	3	1	
Gaston	3	17	22	10			120	49	2	
Gates						1	3	12		1
Graham							8	1		
Grauville	1	2	3	1	1		27	15		
Greene	4			5			8	5	1	1
Guilford	7	6	1	38	1	2	118	79	2	7
Halifax	1	4	4	1			39	19		
Harnett	2	1	2				20	12		
Haywood	15	1	9	2		3	116	11	5	
Henderson	2	2	12				49	11		
Hertford	8						2	2	2	
Hoke				1			7	5		
Hyde				2			5	11		
Iredell	1	1					13	27		
Jackson		4	5				37	5		
Johnston	2	5	4	4		1	18	14	1	3
Jones							7	7		
Lee	4	1	16	1			19	13		
Lenoir	8	10	2	5		1	24	19		
Lincoln	1	3	12				16	8		3
Macon	4	1	5	2		2	19	5	6	
Madison							22	8		
Martin	1	1		2			6	4	5	
McDowell	4	2	5				52	12		
Mecklenburg	3	16	53	5	1		189	97	1	
Mitchell			5				40	2	1	1
Montgomery	7	1	2		1		25	7	3	
Moore	1	1		5			22	7	1	
Nash	7	2	7	19	1		17	29	1	2
New Hanover	2	1	5	18			19	31		
Northampton				4			9	7	2	

STATEMENT B—Continued

County	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxiating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Onslow.....										3	10						
Orange.....	5		2	32		1			1	41	16						
Pamlico.....				8						7	13						
Pasquotank.....						1				9	19			1			4
Pender.....	1	1								4	14						
Perquimans.....			3	5						5	13				1		
Person.....	3									13	1				1		
Pitt.....		5	1	16						38	36		1				
Polk.....										60	9						1
Randolph.....	4		3	6		2				40	29			4			
Richmond.....	1	1	1	19		11	2		1	62	38		1				
Robeson.....	2	5	22							20	22				1		
Rockingham.....	2			8		5				23	20				1		1
Rowan.....	3	3		1		1				16	9				2		
Rutherford.....			3			1				49	9						
Sampson.....	3	1	2	7		2	1	1	1	44	25						
Scotland.....		1	4			5				7	12						
Stanly.....		1				1					5				1		
Stokes.....	1	1	2						2	31	8						
Surry.....	3	3	1	4		2				28	4				1		
Swain.....			4	7		2			4	16	9						
Transylvania.....											7						
Tyrrell.....		1								1							
Union.....	1	1				6	2			10	10				1		
Vance.....			1			1				10	22			2	1		
Wake.....	6	14	9	12					3	151	91		1		5		
Warren.....	1	1							2	4	4						
Washington.....		1				1			1		3						

[illegible]

STATEMENT B—Continued

County	Murder—First Degree	Murder—Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous
Alamance.....		2							2		2			1	5	4
Alexander.....													2		1	18
Alleghany.....		1														
Anson.....									1		2				2	5
Ashe.....		1	4												1	1
Avery.....		4					1									
Beaufort.....		3									4					5
Bertie.....		4					1		1				1			6
Bladen.....		2											2	1	4	
Brunswick.....			11						2						3	
Buncombe.....	1	3	1				4		1		7			2	6	50
Burke.....	1	1	1								1				1	4
Cabarrus.....							1						2			4
Caldwell.....		1							1				1	1		2
Canden.....																
Carteret.....									2							4
Caswell.....		2	2													2
Catawba.....		1					1		1				1		3	2
Chatham.....		2							3						1	5
Cherokee.....		1						1					1		1	3
Chowan.....																1
Clay.....						1										3
Cleveland.....							1		1				1	1		2
Columbus.....	2	4	1								2					5
Craven.....		5				5		1			4		1			3
Cumberland.....		6									5		1			12
Currituck.....									2				2			
Dare.....													1			5

[illegible]

STATEMENT B—Continued

County	Murder—First Degree	Murder—Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous
Onslow.....	4		1						1						1	4
Orange.....								1	2						5	10
Pamlico.....																
Pasquotank.....		2													2	4
Pender.....				2					1							2
Perquimans.....			3													3
Person.....		5	3					1					1		2	21
Pitt.....		7														3
Polk.....			2						1							3
Randolph.....								2								6
Richmond.....		1						2	1							10
Robeson.....		5	6										5		1	6
Rockingham.....		3	2						1				2			2
Rowan.....	1	2							1		1		1			2
Rutherford.....		2														2
Sampson.....		2							7							6
Scotland.....		4						1								3
Stanly.....		2														
Stokes.....		1	1						1				1			2
Surry.....			2						1							4
Swain.....		2							1							4
Transylvania.....		1	1											1	7	2
Tyrrell.....																31
Union.....		2														3
Vance.....		1				1									3	4
Wake.....		7						1							2	8
Warren.....		1							4						1	32
Washington.....		2							1							1

[illegible]

STATEMENT C

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF DURING THE FALL TERM, 1923, AND SPRING TERM, 1924

County	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of
Alamance.....	169	91	-----	244	16	208	31	21	-----
Alexander.....	76	6	-----	82	-----	76	4	2	-----
Alleghany.....	30	-----	-----	30	-----	27	3	-----	-----
Anson.....	62	141	-----	198	5	148	23	30	2
Ashe.....	51	-----	-----	48	3	41	10	-----	-----
Avery.....	63	7	-----	65	5	66	4	-----	-----
Beaufort.....	32	35	-----	64	3	56	11	-----	-----
Bertie.....	40	85	-----	121	4	94	12	19	-----
Bladen.....	20	17	-----	36	1	37	-----	-----	-----
Brunswick.....	11	13	-----	24	-----	23	1	-----	-----
Buncombe.....	481	186	-----	587	80	467	15	185	-----
Burke.....	150	23	-----	166	7	172	1	-----	-----
Cabarrus.....	100	39	-----	131	8	106	17	16	-----
Caldwell.....	63	17	-----	79	1	80	-----	-----	-----
Camden.....	8	5	-----	13	-----	13	-----	-----	-----
Carteret.....	43	27	-----	69	1	70	-----	-----	-----
Caswell.....	39	42	-----	80	1	67	11	3	-----
Catawba.....	126	24	-----	146	4	148	1	1	-----
Chatham.....	61	105	-----	163	3	146	12	6	2
Cherokee.....	83	3	2	83	5	66	12	10	-----
Chowan.....	15	11	-----	26	-----	17	8	1	-----
Clay.....	16	4	-----	19	1	12	7	1	-----
Cleveland.....	51	28	-----	79	3	56	15	10	1
Columbus*.....	108	63	-----	163	9	99	27	42	5
Craven.....	23	56	-----	73	6	64	7	8	-----
Cumberland.....	80	73	1	141	13	94	25	32	3
Currituck.....	4	1	-----	5	-----	5	-----	-----	-----
Dare.....	29	-----	-----	26	3	22	-----	7	-----
Davidson.....	130	42	-----	169	3	124	27	20	1
Davie.....	33	6	-----	36	3	18	4	17	-----
Duplin.....	181	115	-----	280	16	172	62	62	-----
Durham.....	178	183	-----	336	25	253	27	80	1
Edgecombe.....	42	112	-----	148	6	122	18	14	-----
Forsyth.....	320	288	-----	544	64	511	41	53	3
Franklin.....	123	84	-----	198	9	184	12	11	-----
Gaston.....	224	75	-----	285	14	293	-----	4	2
Gates.....	21	24	-----	44	1	36	6	3	-----
Graham.....	18	-----	-----	18	-----	7	3	8	-----
Granville.....	48	61	-----	106	3	86	18	5	-----
Greene.....	28	33	-----	60	1	42	10	8	1
Guilford.....	217	164	-----	361	20	266	52	58	5
Halifax.....	70	126	-----	190	6	196	-----	-----	-----
Harnett.....	42	39	-----	76	5	45	20	16	-----
Haywood.....	326	19	-----	336	9	117	18	204	7
Henderson.....	102	43	-----	136	9	112	23	8	2
Hertford.....	32	71	-----	98	5	61	11	31	-----
Hoke.....	8	28	1	36	1	25	12	-----	-----
Hyde.....	10	15	-----	24	1	15	2	8	-----
Iredell.....	45	23	-----	67	1	52	6	9	1
Jackson.....	31	-----	-----	31	-----	12	5	14	-----
Johnston.....	56	36	-----	91	1	70	20	2	-----
Jones.....	14	25	-----	39	-----	29	1	8	1

STATEMENT C—Continued

County	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of
Lee†.....	95	69	-----	156	8	134	9	24	-----
Lenoir.....	130	119	-----	219	30	160	39	50	-----
Lincoln.....	153	48	-----	188	13	145	9	43	4
Macon.....	88	8	-----	95	1	41	17	38	-----
Madison.....	81	1	-----	80	2	82	-----	-----	-----
Martin.....	14	15	-----	29	-----	29	-----	-----	-----
McDowell.....	110	24	-----	125	9	99	14	19	2
Mecklenburg.....	412	358	-----	716	54	526	62	157	25
Mitchell.....	173	1	-----	171	3	109	3	62	-----
Montgomery.....	55	57	-----	110	2	91	18	3	-----
Moore.....	58	87	-----	138	7	83	15	46	1
Nash.....	45	67	-----	103	9	57	19	35	1
New Hanover.....	113	79	-----	175	17	163	17	8	4
Northampton.....	20	63	-----	77	6	54	6	21	2
Onslow.....	29	27	-----	52	4	56	-----	-----	-----
Orange.....	86	103	-----	180	9	133	19	37	-----
Pamlico.....	23	36	-----	57	2	43	9	7	-----
Pasquotank.....	39	30	-----	69	-----	50	16	-----	3
Pender.....	47	40	-----	82	5	55	10	22	-----
Perquimans.....	54	99	-----	140	13	125	14	13	1
Person.....	73	38	-----	106	5	109	2	-----	-----
Pitt.....	54	117	-----	162	9	96	33	41	1
Polk.....	39	17	-----	53	3	26	10	18	2
Randolph.....	167	94	-----	257	4	169	17	73	2
Richmond.....	134	168	-----	289	13	244	15	43	-----
Robeson.....	96	70	56	212	10	146	18	56	2
Rockingham.....	92	32	-----	116	8	124	-----	-----	-----
Rowan.....	94	27	-----	112	9	73	17	30	1
Rutherford.....	78	22	-----	96	4	75	9	16	-----
Sampson.....	94	72	3	155	14	130	39	-----	-----
Scotland.....	27	17	-----	43	1	31	7	6	-----
Stanly.....	5	10	-----	14	1	15	-----	-----	-----
Stokes.....	74	32	-----	101	5	90	5	11	-----
Surry.....	154	15	-----	163	6	149	15	5	-----
Swain.....	60	5	8	72	1	53	20	-----	-----
Transylvania.....	57	15	-----	66	6	56	16	-----	-----
Tyrrell.....	34	3	-----	36	1	30	6	1	-----
Union.....	69	35	-----	99	5	74	8	22	-----
Vance.....	86	50	-----	128	8	83	28	25	-----
Wake.....	364	337	-----	663	38	565	63	64	9
Warren.....	12	35	-----	45	2	33	8	3	3
Washington.....	7	12	-----	17	2	7	7	4	1
Watauga.....	96	9	-----	101	1	68	5	32	-----
Wayne.....	37	69	-----	97	9	104	2	-----	-----
Wilkes.....	220	16	-----	219	17	135	21	76	4
Wilson.....	162	227	-----	370	19	220	55	114	-----
Yadkin.....	37	9	-----	46	-----	45	1	-----	-----
Yancey.....	62	1	-----	63	-----	32	7	24	-----
Totals.....	8,645	5,599	71	13,535	780	10,545	1,385	2,286	105

*2Corporations

†1Corporation

‡3Corporations

Recapitulation of Statement C

TOTAL NUMBER CRIMINAL ACTIONS DISPOSED OF.....		14,321
Males.....	13,535	
Females.....	780	
Corporations.....	6	
Total.....		14,321
White.....	8,645	
Colored.....	5,599	
Indians.....	71	
Corporations.....	6	
Total.....		14,321
Convictions, including submissions.....	10,545	
Acquitted.....	1,385	
Nolle Pros.....	2,286	
Otherwise disposed of.....	105	
Total.....		14,321

STATEMENT D

THE FOLLOWING STATEMENT SHOWS THE OFFENSES WITH WHICH DEFENDANTS WERE CHARGED IN THE VARIOUS COUNTIES OF THE STATE DURING THE FALL TERM, 1923, AND SPRING TERM, 1924

County	Abandonment	Abduction	Abortion	Atfay	Arson	Assault and Battery	Assault with Deadly Weapon	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bastardy	Bigamy	Bribery	Bugery	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Alamance		1				41	13					2					
Alexander				6		7											
Alleghany				1		10	1										
Anson				1	2	1	20	2									
Ashe						1	13										
Avery						14	5										
Beaufort							4			1							
Bertie	1			20		4	20	1									
Bladen						2	5										
Brunswick						1	2										
Buncombe	14			3		46	47					2				1	
Burke	1			11		4	39										
Cabarrus	4			7		6	17										
Caldwell	2			5		5	10										
Camden						2	3										
Carteret	1	2		2		1	1										
Caswell				5			12										
Catawba	2			11		6	17										
Chatham	2			4		20										1	
Cherokee						10	11	1								3	
Chowan							5	1				1					
Clay						2	1										
Cleveland	1					6	4					2	1	1			
Columbus		2		3		17	15	1				1					1
Craven						2	12	3					1				

STATEMENT D—Continued

County	Abandonment	Abduction	Abortion	Affray	Arson	Assault and Battery	Assault with Deadly Weapon	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bastardy	Bigamy	Bribery	Burgery	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Cumberland																	
Currituck		1				11	12									1	
Dare						2	1										
Davidson	3				1	5	18					1					
Davie	1			5		1	3									2	
Duplin	1	3		7		8	45	1									
Durham						4	33										
Edgecombe	3	1		4		6	11	1					1			1	
Forsyth	8	5	1			14	39	2					2			4	
Franklin	2	1	1	4		9	19									1	
Gaston	4					24	3	2				3					
Gates				6		1	10										
Graham	1					12	9	2								1	
Granville						2											
Greene		1		2		5	9										
Guilford	6	3	1	2	1	11	19					5				1	
Halifax	4			1		35						1				2	
Harnett						2	7		2								
Haywood	4			6		6	31	2				2				1	
Henderson	1			2		5	10										
Hertford	2	1		2		26	1	1				1				1	
Hoke																	
Hyde	1			4			9										
Iredell						3	7										
Jackson												1					
Johnston						1	5	2									
Jones	1					3	9	2									
Lee	2	1				5	9					1					

Lenoir	6			1	1	9	34	2			1		1
Lincoln	1	2		4	13	8							
Macon	4			4	3	9							1
Madison	1			2	6	7							
Martin	1				2	7					1		
McDowell	6	5			7	4							2
Mecklenburg	16	1	3	2	3	47	10	3			2		8
Mitchell	1			4	3	9	1				1		6
Montgomery					9	12							
Moore		1				21							
Nash				2				1			1		1
New Hanover	2			3	1	6	7	1			1		
Northampton		1				14	18	1					
Onslow	1			4		5	2						
Orange	3			11		16	19				1		
Panlico	1					1	11	1					1
Pasquotank	2						10						2
Pender	1			1		9	10						
Perquimans	1	4		5	8	22							
Person	1			10	7	5					1	1	
Pitt	1					3	25						
Polk	1			3	3	4							
Randolph	3			7	11	23		1		3	1		1
Richmond	4	1		1	7	22		1			2	1	
Robeson		3		2	2	36	10				2		1
Rockingham		2				11	6	2					
Rowan	3			1	3	6	9	2					1
Rutherford	2					1	1				1		
Sampson	4				16	15		1					
Scotland	1					4					1		
Stanly													
Stokes				3	4	11							
Surry	2			1	2	21		2					
Swain				3	3	8							2
Transylvania	1			2	1	1		8					
Tyrell						1	3						
Union	2				7	8					1		
Vance	2					13	7						

STATEMENT D—Continued

County	Abandonment	Abduction	Abortion	Affray	Arson	Assault and Battery	Assault with Deadly Weapon	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bastardy	Bigamy	Bribery	Burgery	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Wake.....	8	1	—	1	—	15	75	1	—	—	—	4	—	—	—	3	—
Warren.....	—	—	—	2	—	3	4	1	—	—	—	—	—	1	—	—	—
Washington.....	—	—	—	—	—	—	—	1	—	—	—	—	—	—	—	—	—
Watauga.....	—	—	—	—	3	—	10	—	—	—	—	—	—	—	—	—	—
Wayne.....	1	—	—	3	—	4	4	—	—	—	—	—	—	—	—	—	—
Wilkes.....	1	—	—	5	—	8	4	2	—	—	—	1	—	—	—	1	—
Wilson.....	—	—	—	—	5	11	36	1	—	—	—	—	—	—	—	3	—
Yadkin.....	11	2	—	3	—	16	38	—	—	—	—	—	—	—	—	—	—
Yancey.....	—	—	—	3	—	3	10	—	—	—	—	—	—	—	—	—	3
Totals.....	108	44	7	221	16	744	1,222	59	2	1	1	45	8	4	—	54	10

STATEMENT D—Continued

County	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Alamance.....	13						19	3			1				4		
Alexander.....	4							1					2		2	1	
Alleghany.....	4								1								
Ashe.....	22						4	1			1		2	1	2		
Aston.....	4					2	2		5								
Ashe.....	4					2			4								
Avery.....	9					1	3	1	4		1	2			2	3	
Beaufort.....								1									
Bertie.....	14			2			2	3	6		1		2		1	1	
Bladen.....	9														1		
Brunswick.....	1								1		1						
Buncombe.....	21					1	13	2	5		10	15			15	2	1
Burke.....	6							1	2								
Cabarrus.....	7							4			2						
Caldwell.....	6						1		1		1	1			1		
Canden.....																5	
Carteret.....	1					1		1					1				
Caswell.....	6					1	3		2								
Catawba.....	3						2		4								
Chatham.....	14														1		
Cherokee.....	3								1						1		
Chowan.....	2															1	
Clay.....	1								1								
Cleveland.....	5						2				2				1		
Columbus.....	6						2	3			2				1		
Craven.....	4					4					4	2			7		
Cumberland.....																	
Currituck.....	7						2	1			1				1		
Dare.....			3											5		1	

STATEMENT D—Continued

County	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Davidson.....	7						19	1	1			6			2		
Davie.....	4							1	1								
Duplin.....	18					11	6	10	1		2				4		
Durham.....	10					1	9	2			8	1			2		
Edgecombe.....	8					1					3				2		
Forsyth.....	34		1	2			12	3			16				6		3
Franklin.....	11					1	10	1			1				1		
Gaston.....	19					1	5	1	1		1				2		1
Gates.....									4						1		
Graham.....	2					1		1	3						1		
Granville.....	12						1				1				1		
Greene.....	4							1			1						
Gulford.....	20					2	4				2				6		
Halifax.....	20							2	1		1				1		
Harnett.....	2		1					2			1				2		
Haywood.....	22					1		2	1		1	2			4		4
Henderson.....	18						1		1			1			1		
Hertford.....	5							3			1						
Hoke.....																	
Hyde.....	1														1		
Iredell.....	2							2				1	1				
Jackson.....	1											1					
Johnston.....	3					1		2								1	
Jones.....	1					2		1									
Lee.....	17					2						1				5	
Lenoir.....	15					1	15	3	3		1	1	10		5		
Lincoln.....	11							4	5		1	3					
Macon.....	12					1		1	4		1				2		

[illegible]

STATEMENT D—Continued

County	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Watauga.....	5						1	2	8					2	1		
Wayne.....	4						3		2		1				2		1
Wilkes.....	14			2		2	10	1	6		1	2	2		6		
Wilson.....	30					2	13	3	2		1			2	5		2
Yadkin.....	1								4								
Yancey.....	7							1			1				1		
Totals.....	805		7	18		51	236	125	121		110	74	35	8	176	28	8

STATEMENT D—Continued

County	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manlaughter	Military Laws	Municipal Ordinances
Alamance.....			1	16						98	35						
Alexander.....				5					1	20	8						
Alleghany.....										9	1						
Anson.....		7	1	6		9			3	72	22						1
Ashe.....		2								14							
Avery.....				1						20	2				6		
Beaufort.....		3				3			3	16	11				2		
Bertie.....			2			3			3	11	11				1		
Bladen.....			1							8	3						
Brunswick.....									5	3					1		
Buncombe.....	1	22	11	54		15			4	190	73		1	1	1		1
Burke.....	2	2	2	6				1		59							
Cabarrus.....	1	2	4	10		8		1		33	22						
Caldwell.....	2			2						33	3					1	
Camden.....											2						
Carteret.....	1	1		4						37	8						
Caswell.....	6			5						24	4				1		
Catawba.....	2	1	1	10		1				56	14						
Chatham.....				12						94	8				1		
Cherokee.....				12			1			30							
Chowan.....										3	3				1		
Clay.....		1								7	1						
Cleveland.....			3	1		5				28	12				1		
Columbus.....	1	3	9			5	1		1	45	6		1				
Craven.....		5	2	1		7				20	10						
Cumberland.....		3				14				19	52				4		2
Currituck.....						1											
Dare.....										2							

STATEMENT D—Continued

County	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Davidson.....		2	5	6	1	3				44	27						1
Davie.....	2		2					1		9	5						
Duplin.....	8	1	14	6						46	12				2		
Durham.....	9	11	2	9	2	26			1	82	60				3		1
Edgecombe.....	2	7	1		1	20				30	12				11		4
Forsyth.....	2	13	5	28			2			167	95						
Franklin.....	1	1	6	11	1	9				67	25				4		
Gaston.....	4	5	3	42		9		3		97	43				1		
Gates.....										4	8						
Graham.....										5	1						
Granville.....	3	1	1			3			1	37	15				1		
Greene.....	1		3	1		1				8	11						
Gulford.....	1	24	3	2		50				87	70				6		
Halifax.....		2	1	7		1			2	78	15				4		
Harnett.....	1	4	2	3					1	20	19						
Haywood.....	11	1	7	6					2	199	18						
Henderson.....	2	1	3	6		2				59	18		1				
Hertford.....			3			5				13	11						
Hoke.....			2							8	13				3		
Hyde.....						1					5						
Iredell.....	1	5				4				12	20	1					
Jackson.....										10	3						1
Johnston.....		1	3	1		6				29	28						1
Jones.....	1									7	7						
Lee.....	4	9	5	8		5				62	20						
Lenoir.....	4	3	6			6				56	32				6		
Lincoln.....			2	2				1	1	79	41				1		
Macon.....	1		1	4		2				28					1		

Madison	1	1	3	5						32	10				
Martin	2										8				
McDowell			2	12	3					1	56			1	
Meckenburg	1	31	7	44	24					1	234				
Mitchell		1		1							3			6	
Montgomery	10		3	3	2					2	70			1	
Moore			5		5						69				
Nash	3	5	3								15				
New Hanover	3	2	4	43	1	6					20			3	
Northampton	1		4								14			1	
Onslow	1		4	2							17				
Orange				12	11					1	62				
Pamlico			2								13			1	
Pasquotank		1									19			2	
Pender			4		1						23			3	
Perquimans				32							30			1	
Person			1	7							47				
Pitt.	2	2	3	4	1					3	37			7	
Polk			3								19				
Randolph	7	1	4	5							103			1	
Richmond	4	1	5	29	1						66				
Robeson	2	3	3			6	2				42			3	
Rockingham	1			14	3						43			2	
Rowan	4	1		2	14	2					19			1	
Rutherford	3	1			1					1	75			2	
Sampson	5	2		4	1	1				1	48				
Scotland			2								10				
Stanly					3						9				
Stokes											2			2	
Surry	4	2	3	5	3					2	71			2	
Swain				8							29				
Transylvania			2							1	33				
Tyrell										1	17				
Union			1		7						9			1	
Vance	7										20			2	
Wake											108			7	
Warren	4	20	10	13	41					2	242				
Washington				9	1					1	5			13	
		2									7				

STATEMENT D—Continued

County	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Watauga.....			5			1				45	5			1	1		
Wayne.....			2			8				21	30						
Wilkes.....	4	1	8	1		18	1		3	40	15				1		
Wilson.....	1	2	1	13		9		1	1	131	42				5		1
Yadkin.....			1							17	2				2		
Yancey.....						1				35	3						
Totals.....	140	227	220	559	9	524	14	13	56	4,322	1,747	1	4	5	130		21

STATEMENT D—Continued

[illegible]

STATEMENT D—Continued

County	Murder—First Degree	Murder—Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous
Davidson.....		1						1	1		1	1	3			12
Davie.....											2					1
Duplin.....		6		1				1							4	72
Durham.....			7	1				1	6		10		1	2	7	41
Edgecombe.....	1	1					1		3		2		2			15
Forsyth.....		15	5				1	1	6		2	2	2		4	45
Franklin.....		3							1			4			2	9
Gaston.....		2	4						1				1		1	16
Gates.....									1							10
Graham.....									1							
Granville.....		3														3
Greene.....		1						1					3			8
Guilford.....		6					4	1	3		6	1	1			34
Halifax.....		1	2						1				1		1	12
Harnett.....		4									1	1			1	5
Haywood.....		4											2	1	2	6
Henderson.....		5					1		1				1		1	4
Hertford.....							2									24
Hoke.....	1	3				1										2
Hyde.....													1		1	3
Iredell.....		1							1		2		1			3
Jackson.....									1							2
Johnston.....												1	3	1		4
Jones.....									1				2			
Lee.....		4							3							5
Lenoir.....		3	1					1			1		3	1	2	14
Lincoln.....		2	3						1						2	14
Macon.....				1		3			1				2			10

[illegible]

STATEMENT D—Continued

County	Murder—First Degree	Murder—Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous
Watauga.....			2						1						1	3
Wayne.....		5											1			6
Wilkes.....		6	5	2			2	2	5					3	2	14
Wilson.....		6							5		9		1		6	26
Yadkin.....																1
Yancey.....													1			1
Totals.....	5	232	106	18		9	22	18	114	69	80	21	76	23	132	996

STATEMENT E

	From July 1, 1922 to July 1, 1923		From July 1, 1923 to July 1, 1924	
Number of criminal actions disposed of.....		11,813		14,321
Males.....	11,146		13,535	
Females.....	660		780	
Corporations.....	7		6	
Totals.....		11,813		14,321
White.....	6,781		8,645	
Colored.....	4,991		5,599	
Indians.....	34		71	
Corporations.....	7		6	
Totals.....		11,813		14,321
Convictions, including submissions.....	8,419		10,545	
Acquitted.....	1,296		1,385	
Nolle pros.....	1,969		2,286	
Otherwise disposed of.....	129		105	
Totals.....		11,813		14,321
Murder—first degree.....	14		5	
Murder—second degree.....	191		232	
Manslaughter.....	67		130	
Rape.....	22		18	
Assault with intent to rape.....	58		59	
Arson.....	17		16	
Burglary—first degree.....	2			
Burglary—second degree.....	61		54	
Forgery.....	208		227	
Larceny.....	1,685		1,747	
Intoxicating liquors.....	2,753		4,322	
Other crimes and misdemeanors.....	6,735		7,511	
Totals.....		11,813		14,321

STATEMENT F

ALPHABETICAL LIST OF CRIMES COMMITTED FROM JULY 1, 1922, TO JULY 1, 1924

Name of Offense	From July 1, 1922 to July 1, 1923	From July 1, 1923 to July 1, 1924
Abandonment.....	142	168
Abduction.....	35	44
Abortion.....	6	7
Affray.....	258	221
Arson.....	17	16
Assault and Battery.....	618	744
Assault with deadly weapon.....	1,251	1,222
Assault with intent to rape.....	58	59
Attempt to burn dwelling.....		2
Attempt to poison.....	1	1
Bastardy.....	4	1
Bigamy.....	48	45
Bribery.....	5	8
Buggery.....		4
Burglary—first degree.....	2	
Burglary—second degree.....	61	54
Burning other than arson.....	15	10
Carrying concealed weapons.....	782	805
Compounding Felony.....		
Concealing birth of child.....	2	7
Conspiracy.....	18	18
Counterfeiting.....		
Cruelty to animals.....	39	51
Disorderly house.....	171	236
Disposing mortgaged property.....	122	125
Disturbed Meetings.....	145	121
Election laws.....	2	
Embezzlement.....	123	110
Escape.....	71	74
Failure to list taxes.....	23	35
Failure to work public road.....	34	8
False pretense.....	202	176
Fish and game laws.....	41	28
Food and drug laws.....	31	8
Forcible trespass.....	165	140
Forgery.....	208	227
Fornication and adultery.....	219	220
Gambling or lottery.....	443	559
Health laws.....	4	9
Housebreaking.....	355	524
House burning.....	8	14
Incest.....	12	13
Injury to property.....	47	56
Intoxicating liquors.....	2,753	4,322
Larceny and receiving.....	1,685	1,747
Libel.....	1	1
License, practicing profession without.....	14	4
License, doing business without.....	28	5
Manslaughter.....	67	130
Military laws.....		
Municipal ordinances.....	19	21
Murder, first degree.....	14	5
Murder, second degree.....	191	232
Nuisance.....	65	106
Obstructing public highway.....	7	18

STATEMENT F—Continued

Name of Offense	From July 1, 1922 to July 1, 1923	From July 1, 1923 to July 1, 1924
Obstructing river.....	2	-----
Official misconduct.....	10	9
Perjury.....	28	22
Rape.....	22	18
Resisting officer.....	100	114
Riot.....	-----	69
Robbery.....	74	80
School laws.....	3	21
Seduction.....	63	76
Slander.....	29	23
Trespass.....	134	132
Miscellaneous.....	710	966
Totals.....	11,813	14,321

Fees Transmitted by Attorney-General to State Treasurer from August Term, 1922, Through February Term, 1924

49	State v. Boston.....	\$ 10.00
81	State v. Bell.....	13.30
162	State v. Ward and Leho.....	20.00
241	State v. Jenks.....	13.30
273	State v. Green.....	12.20
274	State v. Mallard.....	15.50
321	State v. Bradshaw.....	12.20
324	State v. Burton.....	10.00
322	State v. Vickers.....	13.30
323	State v. Bradshaw, et al.....	23.30
347	State v. Greer.....	10.00
377	State v. Harrison.....	13.30
378	State v. Schoolfield.....	24.40
433	State v. Grier.....	13.30
445	Carpenter V. Highway Commission.....	6.60
466	State v. Faulkner.....	11.10
468	State v. Presnell.....	12.20
498	State v. Wingle.....	13.30
499	State v. Jackson and Spicer.....	33.30
500	State v. Burnett and McQuinn.....	22.20
533	State v. Mann.....	11.10
535	State v. Dillingham.....	12.20
536	State v. Gasperson, et al.....	31.10
578	State v. Baldwin.....	13.30
539	State v. Buckner.....	12.20
250	Person v. Watts.....	20.00
11	Latham v. Highway Commission.....	4.40
60	Road Commissioners v. Highway Commission.....	3.30
497	State v. Butler.....	13.30
49	State v. Gupton.....	20.00
82	State v. Brame.....	15.50
83	State v. Lewis.....	17.70
84	State v. McLamb.....	10.00
139	State v. Williams.....	13.30
209	State v. Williams.....	15.16
211	State v. Staton.....	10.00
212	State v. Rhodes.....	10.00
241	State v. Wheeler.....	12.20
242	State v. Foster.....	12.20
243	State v. Foster.....	12.20
244	State v. Journgan.....	13.30
245	State v. High.....	12.20
246	State v. Davis.....	12.20
254	Corporation Commission v. Southern Railway Company, et al.....	13.20
274	State v. Kennedy.....	10.00
345	State v. Russ.....	13.30
346	State v. Worth.....	1.10
347	State v. Edmonds.....	15.50
348	State v. Sisk, et al.....	26.60
349	State v. Butler.....	10.00
351	State v. Spencer.....	13.30
---	State v. Kirkley.....	10.00
377	State v. Reagan.....	13.30
378	State v. Hedgecock.....	16.60
380	State v. Tally.....	10.00
401	State v. Trull.....	15.50
402	State v. Steen.....	16.60
499	State v. Potter.....	12.20
500	State v. Whisnant.....	22.20

Fees Transmitted by Attorney-General to State Treasurer from August Term, 1922, Through February Term, 1924—
Continued

502	State v. Griffith.....	13.30
503	State v. Jests.....	13.30
533	State v. Miller.....	13.30
579	State v. McLean, et al.....	10.00
441	Automotive Association v. Attorney-General.....	47.40
...	State v. Hill.....	10.00
...	State v. Thompson.....	10.00
...	State v. Garrison.....	10.00
147	State v. Murphrey.....	12.20
378	State v. Varner.....	10.00
379	State v. Hughes.....	10.00
380	State v. Lambeth.....	10.00
381	State v. Crotts.....	10.00
382	State v. Teague.....	10.00
83	State v. Bailey.....	10.00
214	State v. Richardson.....	14.40
273	State v. Kelly, et al.....	12.20
274	State v. Oliver.....	13.30
275	State v. Plummer.....	12.20
277	State v. Norris, et al.....	20.00
278	State v. Barnhill.....	13.30
323	State v. Gulley.....	16.60
322	State v. Hendricks.....	15.50
81	State v. Bowman.....	17.50
347	State v. Hopper.....	15.50
345	State v. Coe.....	12.20
377	State v. Green.....	12.20
383	State v. Switzer.....	16.60
...	State v. Riley, et al.....	10.00
384	State v. Reece.....	12.20
384a	State v. Matthews.....	16.60
279	State v. Walton, et al.....	38.80
408a	State v. Eldred.....	12.20
408b	State v. Hawley.....	18.80
408c	State v. Hooker.....	13.30
408e	State v. J. J. Peele.....	10.00
408f	State v. B. J. Peele.....	10.00
466	State v. Hasty.....	15.50
497	State v. Williams.....	13.30
498	State v. Byers.....	13.30
499	State v. Logan.....	13.30
500	State v. Biggerstaff.....	13.30
533	State v. Wallin.....	13.30
534	State v. Edmonds.....	13.30
535	State v. Edmonds.....	13.30
243	State v. O'Neal.....	14.40
538	State v. Jones.....	10.00
536	State v. Earwood.....	10.00
537	State v. Anders.....	10.00
82	State v. Vaughan.....	14.40
577	State v. Suncrest Lumber Company.....	13.30
245	State v. Jenkins.....	10.00
346	State v. Nichols.....	10.00
349	State v. Flynn.....	10.00
86	State v. Lee.....	10.00
49	State v. Edwards.....	14.40

Fees Transmitted by Attorney-General to State Treasurer from August Term, Through February Term, 1924—
Continued

209	State v. Morgan	\$ 10.00
210	State v. Williams	10.00
262	Norfolk Southern Railroad Company v. Lacy, Treasurer	2.20
250	Corporation Commission v. Atlantic Coast Line Railroad Company	9.90
277	State v. Elkins	12.20
273	State v. Brooks	27.60
274	State v. Levy	15.50
276	State v. Green	13.30
324	State v. Baldwin	14.40
346	State v. Crutchfield	22.10
347	State v. Ashburn	21.00
348	State v. Dunnigan & Charles	24.40
349	State v. Dison	12.20
351	State v. Starnes	10.00
350	State v. Ross	10.00
380	State v. Long	10.00
377	State v. Myers	10.00
378	State v. Valley	13.30
381	State v. Gordon	10.00
391	Bank v. Lacy	16.50
394	Vaughan v. Lacy	4.40
417	State v. McCoy	12.20
418	State v. Barrett	12.20
419	State v. Shepherd	14.40
352	State v. Barts & Poteat	20.00
465	State v. Young	15.50
467	State v. Cauble	10.00
468	State v. Cauble	10.00
469	State v. Abernethy	10.00
280	State v. Carter	10.00
570	State v. Welch	10.00
81	State v. Bryant	10.00
82	State v. Kelly	10.00
83	State v. Headen	10.00
84	State v. Forrester	10.00
85	State v. Fearington	10.00
342	Cameron, et al. v. Highway Commission	14.30
382	State v. Ball	10.00
249	Rhode Island Hospital Trust Company v. Revenue Commission	28.40
		<hr/>
		\$2,103.06

OPINIONS TO THE GOVERNOR

GENERAL ASSEMBLY—VACANCIES—SPECIAL ELECTION

January 10, 1923.

HON. CAMERON MORRISON, *Governor of North Carolina, Raleigh, N. C.*

ATTENTION OF MR. W. H. RICHARDSON.

DEAR SIR:—In the matter of vacancies in the General Assembly. Section 13 of Article II of the Constitution provides:

If a vacancy shall occur in the General Assembly by death, resignation or otherwise, writs of election shall be issued by the Governor under such regulations as may be prescribed by law.

C. S., sec. 5919, if such vacancy occurs when the General Assembly is not in session, requires the chairman of the county board of elections or the sheriff of the county in which the late member resided, to notify the Governor of such vacancy. If the General Assembly shall be in session when the vacancy occurs, it is made the duty of the presiding officer in the house in which the vacancy occurs to notify the Governor. When such notice is given to the Governor, he shall issue a writ of election to the chairman of the county represented by the late member, and therein he shall designate the time at which the election is to be held. C. S., sec. 5975, declares that such special elections shall be held in the same manner as the regular biennial elections.

This is all the legislation upon this subject.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EXTRADITION—NAVY—ENLISTED MAN

September 14, 1923.

MR. WM. H. RICHARDSON, *Private Secretary to the Governor, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of the Secretary of the Navy to Governor Morrison, dated September 10, 1923, in relation to the expenses of the extradition of Vernon Gaston Price, a young man enlisted in the Navy.

It seems that this young man under the rules and regulations provided by the Navy Department was surrendered by that department to the sheriff only upon the written agreement by the sheriff to return young Price to the receiving station at Philadelphia at the expense of the State if he was not convicted of the charge upon which he was extradited. It seems that young Price was acquitted at the trial, and consequently, this agreement of Sheriff Talbert became operative.

The amount of the expense thus incurred was \$45.67. We think under the conditions imposed by the Secretary of the Navy, this is a valid charge against the State and should be paid.

We return herewith Secretary Denby's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EXTRADITION—EXPENSES OF OFFICER

November 9, 1923.

MR. WM. H. RICHARDSON, *Private Secretary to the Governor, Raleigh, N. C.*

IN THE MATTER OF *the reimbursement of Sheriff George C. Jackson of New Hanover.*

DEAR SIR:—It seems that one Leroy Robinson killed Maggie Pugh in Wilmington and fled after committing the crime to South Carolina. On being notified in July of the present year that Leroy Robinson had been arrested at Marion, S. C., and was willing to waive extradition, Sheriff Jackson went immediately to South Carolina for the fugitive, secured him there and brought him back to Wilmington, where he was tried, convicted of murder in the second degree, and sentenced to the State's Prison for not less than fifteen years, where he is now.

In going to South Carolina for Leroy Robinson, Sheriff Jackson incurred expenses to the amount of \$37.58, and he is asking reimbursement from the State for those expenses. We think that C. S., sec. 4554, authorizes the Governor to employ special agents to go after and bring back escaped felons when they waive extradition. The fact that Sheriff Jackson did not have this direct authority from the Governor before going, particularly when it was necessary to act expeditiously, would not affect your authority in the light of the circumstances to reimburse the sheriff under section 4554, this reimbursement amounting in legal effect to the ratification of his act in going. There is no question that he did go in good faith and under the pressure of the circumstances, Robinson having been arrested without warrant and imprisoned in the jail of Marion, S. C. The fact also that his trip was successful, the defendant was convicted and the State derives benefit from his labor for the period of his imprisonment is an appealing circumstance in the case.

We, therefore, advise that you allow Sheriff Jackson's claim against the State to the amount of \$37.58, as per itemized bill filed with you.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

GOVERNOR—DEED TO LIGHTHOUSE SITE

January 4, 1924.

His Excellency, GOVERNOR CAMERON MORRISON, Raleigh, N. C.

ATTENTION OF MISS MARGARET WILLIS.

IN RE: *Bluff Shoals Lighthouse.*

DEAR SIR:—We have examined the file of papers sent you by Mr. H. D. King, Superintendent of Lighthouses. The deed is in proper form.

For some reason, the act quoted by Mr. King in the preamble to the deed was not brought forward in the Code of 1883, the Revisal of 1905, or the Consolidated Statutes of 1919. It is clear, however, that the omission of this act from these statutory revisions did not in any sense operate as a repeal of the same. All these revisions have a section in them similar to Section 8106 of the Consolidated Statutes. This section expressly exempts from repeal any act ceding the lands of the State to the general government. The law itself properly quoted in the preamble to the deed is Chapter 66, of the Laws of 1873 and 1874.

We, therefore, advise that his Excellency, the Governor, execute the deed in accordance with the request of Mr. King and in the form provided by him, and have the same countersigned by the Secretary of State.

We return the file of papers herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REWARD—POLICE OFFICERS

April 21, 1924.

His Excellency, GOVERNOR CAMERON MORRISON, *Raleigh, N. C.*

DEAR SIR:—You have referred to me the question whether or not police officers of the city of Charlotte who arrested Alex. Rodman, charged with the murder of John Fesperman and who was convicted and sentenced to be electrocuted, and for whose capture you offered a reward of \$100.00—are entitled to the reward.

The question is answered by section 4555 of the Consolidated Statutes. That section expressly provides that any sheriff "or other officer" who shall make an arrest of any person charged with a crime, etc.—then follows the proviso, providing that no reward shall be paid to any sheriff "or other officer" for any arrest made for a crime committed within the county of such sheriff "or other officer." It will be noted that the statute uses general words, "or other officer," both in conferring upon him the right to sue for and right to recover the reward, but also in providing that he shall not receive the reward if the crime was committed in his own county. If the police officer comes within the description, "or other officer," in the first part of the section, he must come within the description, "or other officer," when used in other parts of the section. This being true, I regret to say that in my opinion the police officers of the city of Charlotte are not entitled to receive the reward offered by you for the apprehension of a criminal charged with the commission of a crime in the county of Mecklenburg.

I return the papers enclosed in your letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EXTRADITION—EXPENSES OF OFFICER

May 19, 1924.

MR. WM. H. RICHARDSON, *Private Secretary to the Governor, Raleigh, N. C.*

DEAR SIR:—I am returning herein the papers you sent me referring to the case of W. F. Bell, for whom requisition was issued by the Governor of North Carolina to the Governor of Florida, Bell being charged with the larceny of an automobile in Raleigh. You ask if the expenses of his return to Raleigh should be paid by the State, though the officer went without the requisition papers.

In my opinion these expenses should be paid by the State. The fact that the requisition papers were issued when the officer went, if they had been actually needed, he could have wired for them and received them. It is a case similar to where an officer goes armed with requisition papers but the prisoner is willing to return without the use of the papers.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE CONVICT—WITNESS IN ANOTHER STATE

June 20, 1924.

HON. CAMERON MORRISON, *Governor of the State, Raleigh, N. C.*

ATTENTION OF MR. W. H. RICHARDSON, *Private Secretary.*

DEAR SIR:—You state that Governor Trinkle of Virginia has requested of the Governor of North Carolina that he permit a State convict now confined in the State's Prison to be carried by a Virginia officer under proper safeguards preventing his escape, to Virginia, to testify in a cause pending in that State to which the State of Virginia is a party. The State of Virginia is to pay all of the expense of the carriage of the prisoner to Virginia and all expense of his return to the State's Prison in North Carolina, and is to assure such return immediately after the examination of such prisoner as a witness.

Under circumstances of this kind, we advise that comity between the states should permit this and therefore, that you accede to the request of the Governor of Virginia.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SPECIAL ELECTIONS—NOTICE OF

June 27, 1924.

MR. WM. H. RICHARDSON, *Private Secretary to the Governor, Raleigh, N. C.*

DEAR SIR:—You inquire of this office how much time should be given in calling a special election to fill vacancies in the General Assembly. Section 13, of Article II, of the Constitution is as follows:

If vacancies shall occur in the General Assembly by death, resignation or otherwise, writs of election shall be issued by the Governor under such regulations as may be prescribed by law.

The only regulations prescribed by law are what are contained in C. S., sec. 5975, which is as follows:

Every election held in pursuance of the writ from the Governor shall be conducted in like manner as the regular biennial elections, so far as the particular case can be governed by general rules and shall to all intents and purposes be as legal and valid and subject the officers holding and the persons elected to the same penalties and liabilities as if the same had been held at the time and according to the rules and regulations prescribed for a regular biennial election.

All elections presuppose an opportunity to register on the part of all voters entitled to register for that election. Consequently, in order that the election should be valid, it would be necessary that an opportunity to register should be presented to the electors in the county or district.

Turning to C. S., sec. 5947, as amended by Chapter 111, sec. 3, Public Laws of 1923, we find that it is required that the registration books should be opened for the registration of voters at 9 o'clock a.m., on the fifth Saturday before each election. The said books shall be closed at sunset on the second Saturday before each election. Manifestly then, we think, if an election is to be entirely regular, the registration books should be opened and kept open in accordance with this statute, though the election itself is a special election. This would involve the fixing of the time of an election at such a distance in the future as to conform to this statute.

The notice of the registration and of the election might well be coincident so far as the advertisement is concerned. This would be in strict compliance with the law as we interpret it, but we do not intend to suggest that a special election for members of the General Assembly held upon shorter notice and shorter time for registration would not be valid, provided the time was not so short as to prevent those entitled to register from having an opportunity to put their names upon the registration books. See *Hill v. Skinner*, 169 N. C., 405. Especially would this be true with reference to members of the General Assembly, because Section 22 of Article II of the Constitution makes each house the judge of the qualification and election of its own members. No court, then, could intervene and determine whether such a special election was valid or not, nor can any court determine whether or not the time of registration was inadequate under the circumstances under which the election was held.

We think, then, that the Governor may fix the time of these special elections at a shorter period than that which would be regularly done under the statute if the conditions are such as to justify that shorter period, provided, of course, the electors have sufficient time to register before the election.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EMPLOYMENT OF COUNSEL

July 17, 1924.

HON. CAMERON MORRISON, *Governor of the State of North Carolina, Raleigh, N. C.*

DEAR SIR:—This office has been requested to render an opinion upon your authority to employ local counsel to assist the solicitor of the district in the prosecution of a case in Robeson County in which the State itself has an acute interest. We are very clearly of the opinion that you have this authority under the following provision of Section 7640 of the Consolidated Statutes of 1919:

In every case, civil or criminal, in any court in the State, or in any other state or territory, or in any United States court, in which the State of North Carolina is interested, the Governor may employ such counsel as he may deem proper or necessary to represent the interest of the State. In all cases in which the Governor is authorized to employ counsel he may direct the auditor to draw his warrant upon the treasurer to compensate such counsel.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COMMUTATION WITHOUT REVOCATION

June 27, 1923.

MR. WM. H. RICHARDSON, *Private Secretary to the Governor, Raleigh, N. C.*

DEAR SIR:—In reply to yours of June 26th.

After the Governor has commuted the sentence of a prisoner unconditionally, we think he cannot revoke that commutation and thus let the original sentence be enforced, after the commutation has been delivered to the prisoner.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE SECRETARY OF STATE

CORPORATION—FORFEITURE—REINSTATEMENT

September 9, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

IN RE: *Enterprise Realty & Investment Co.*

DEAR SIR:—Replying to your letter of September 9th, in which you ask if a corporation whose charter was canceled for failure to file a report with the Corporation Commission as required by law, can be reinstated after more than two years have elapsed since such cancellation.

In proper cases I think this can be done, but as a condition in any case in reinstating the corporation, it should be required to pay all back taxes, and where the charter has been canceled more than two years without application for reinstatement, I think a penalty of \$50.00 should be added to it.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATIONS—FORFEITURE—REINSTATEMENT

September 15, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MISS MINNIE BAGWELL.

IN RE: *Magnolia Land & Lumber Company.*

DEAR SIR:—It appears that the charter of this corporation was canceled more than two years ago for failure to file a report with the Corporation Commission as required by law, and also on account of failure to pay the franchise tax assessed against it. For some reason the notification of this cancellation failed to reach the company.

The company has been engaged in farming in Tyrrell County, owns a large body of land, and has been conducting its operations without interference since it was incorporated.

The Attorney-General on September 9th in an opinion to you has held that corporations such as this may be reinstated in proper cases if they have paid all back taxes and the penalty of \$50.00. We think this ruling applies to this corporation and consequently we advise upon compliance with these conditions that it be reinstated as of the time of the cancellation of its charter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COÖPERATIVE ASSOCIATION—CHARTER POWER

October 13, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MRS. FOX.

IN RE: *The Carolina Negro Farmers' Coöperative Union, Incorporated.*

DEAR SIR:—We have considered the letter of the Secretary of this Corporation addressed to you, in which he inquires whether this organization could operate a store in its name for the benefit of the membership under its existing charter without amending the same.

One of the objects for which the Union is incorporated is stated thus in sub-section 5:

To assist our members in buying and selling.

We construe this authority as authorizing the Union to establish a store, the customers of which shall be strictly confined to the members of the Union. If it attempts to do a general merchandise business, it will transcend the authority of its existing charter and so it would have to be amended. Limited in this way, however, the charter would not have to be amended.

We return herewith the certificate of incorporation and the letter of the secretary to you.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TRADE MARK—SAME NAME

November 4, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MRS. MINNIE BAGWELL FOX.

DEAR SIR:—In yours of November 2d, you inquire whether or not the name "Martha Washington" can be registered as a trade mark in the manufacture and sale of hosiery. You further state that a manufacturer of candy has already taken out a trade mark in the name of "Martha Washington" for a brand of candy manufactured by him. You desire to know of this office whether or not the hosiery manufacturer may use "Martha Washington" as a trade mark under these circumstances.

The statute, C. S., 3976, declares "it shall not be lawful for the Secretary of State to register for any person any term in identical form theretofore filed by any other person." We think this statute, however, from the nature of the trade mark prevents the use of the same terms colorably like the original terms as applied to the same class of manufacture. This being true in the opinion of this office taking out the name "Martha Washington" as a trade mark for the manufacture of candy does not prevent the use of the same name for the manufacture of hosiery. The courts permit the use

of the name of a celebrity as a trade mark to designate a particular article, but they prohibit its duplication where it has already been appropriated by others, as a trade mark for the same class of articles. There is no danger of anyone being deceived by or confusing "Martha Washington" candy with "Martha Washington" socks.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FOREIGN CORPORATION—DOING BUSINESS

December 13, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. L. P. DENMARK.

IN RE: *Domestication of an Atlanta Company.*

DEAR SIR:—We think that a foreign corporation which maintains in North Carolina a warehouse in which goods are stored and from which they are delivered to customers in the State of North Carolina, should domesticate under the statute, as it would be doing business in this State within the meaning of the statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INDUSTRIAL BANK—PREFERRED STOCK

December 23, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MISS MARY BRADLEY.

DEAR SIR:—The letter from Mr. Clyde A. Duckworth, attorney of Charlotte, N. C., which you enclosed to us and which we return herewith, presents a rather novel and difficult question. He says:

I have some clients who own and operate an industrial bank in this State, and they are desirous of increasing the capital stock from \$100,000 to \$500,000, reducing par value of capital stock from \$100 per share to \$50. They desire to make \$400,000 of said stock a class B stock with no voting power. Will you kindly let me know whether an industrial bank can issue such stock for sale to prospective stockholders?

Mr. Duckworth does not state whether or not this class B stock is to be preferred stock. We assume that it is to be, or at any rate, have certain privileges superior to the common stock. The industrial bank act in section 256 declares that corporations may be organized under this article in the same manner as provided for corporations authorized under the chapter on corporations. Section 259 in enumerating the powers of such industrial bank, declares in the first instance that in addition to the general powers conferred upon corporations formed under the chapter on corporations, every industrial bank shall have the following powers, etc.:

C. S., sec. 1156, provides the method by which every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restriction or qualification thereof as are prescribed by those holding two-thirds of its outstanding capital stock, etc. The court has held that the preferred stockholder of a corporation is not a creditor of the corporation and must be confined to his rights as a stockholder. *Weaver Power Co. v. Mill Co.*, 154 N. C., 76. Attention is called to this because section 261 limits the total liabilities of an industrial bank to 10 per cent of the actual paid-up capital and surplus of such industrial bank. If the class B stock mentioned by Mr. Duckworth could be in any sense considered a borrowing of money, it would be impossible to hold that such bank could contract liabilities for so large an amount. As it is, however, though the question is far from being free from doubt, we think the scheme outlined by Mr. Duckworth, properly safeguarded, is not forbidden to industrial banks as defined in Article 6 of Chapter 5 of Consolidated Statutes.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INSURANCE COMPANIES—STOCK INCREASE—FEES

December 27, 1922.

HON. J. BRYAN GRIMES, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. L. P. DENMARK.

IN RE: *Increase of Capital Stock of Insurance Company Under C. S., 6337.*

DEAR SIR:—We regard the \$5.00 filing fee provided in Section 6337, as a fee for the Secretary of State's office and not a tax. Section 1218 of C. S., as amended by Chapter I, extra session 1920, in the opinion of this office applies to such increases of capital stock. So, you levy the 40 cents per thousand dollars on the increase, and collect the \$5.00 filing fee in addition.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FOREIGN CORPORATION—DOMESTICATION

March 30, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MISS BRADLEY.

IN RE: *Application for domestication by the State & City Bank & Trust Company.*

DEAR SIR:—The application of this company expressly limits the business it is to do in North Carolina to a general real estate mortgage loan business. We think upon the payment of proper fees and conformity to the other requirements of Section 1181 of the Consolidated Statutes you can license this company to do this business in this State.

The statutes of North Carolina expressly prohibit foreign corporations from qualifying in this State as executor, administrator, guardian or trustee under the will of any person domiciled in this State at the time of his death. The company is also prohibited from doing a general banking business in this State except as authorized by the banking department of the Corporation Commission. Your office is denied the authority to authorize insurance companies to do business in this State. When, therefore, this corporation comes into the State to do business under a permit from you, it cannot exercise any powers in this State, though granted it in its original charter by the State of Virginia, which conflicts with the laws of this State. This corporation, then, if it comes into the State of North Carolina will come subject to limitation upon its authority to do the business authorized in its charter, when to do that business is in conflict with the statutes of this State regulating the admission of foreign corporations into it.

While the question is not free from doubt, we think you can safely grant this limited permit to do business in the State, the company having authority under its charter to do the particular business permitted.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATIONS—UNPAID ORGANIZATION TAXES

May 22, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

DEAR SIR:—In reply to yours of May 18th.

As we suppose the amount unpaid by corporations for taxes due on letters incorporating them is in each case less than \$200.00, it would be necessary to bring the action before a justice of the peace in the county where the corporation has its residence. There may be circumstances in a particular case which would amount to fraud upon your office. In such case the Attorney-General could bring an action against the corporation for the forfeiture of its charter, in the county of Wake.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CAPITOL—REPAIRS

June 24, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

DEAR MR. EVERETT:—Your letter of July 21st, enclosing copy of Mr. Atwood's report covering necessary repairs and renovation of the Capitol Building, both outside and in, is received. I have carefully examined this report and also the resolution adopted by the Board of Public Buildings and Grounds.

You inquire (and so does the resolution) if the Board has the power to expend the money necessary to repair and renovate the Capitol Building, including the halls of the Senate and the House of Representatives, and

the offices used by both parties. In this connection I call your attention to section 7027, C. S., which reads in part as follows:

The Board of Public Buildings and Grounds shall take charge of and keep in repair the public buildings of the State in the City of Raleigh; shall, from time to time, as the same may be needed, procure, furnish and keep in repair for the halls of the Senate and House of Representatives and the public offices of the Capitol all necessary furniture . . . The Board at all times is required to use such means as may secure the Capitol from fire.

I think it clear, therefore, from the above section that the Board of Public Buildings and Grounds has the power to carry out the recommendations of Mr. Atwood, excepting perhaps the installation of an elevator. In all other respects, in my opinion, the Board has full authority to expend the money necessary to keep in repair and renovate the Capitol, the public offices therein, the halls of the Senate and the House of Representatives, and the offices used in connection with the General Assembly.

I doubt if it has the power to install an elevator, as I think this would be such a change in the building as ought not to be done except by express legislative direction. I have read Chapter 228 of the Public Laws of 1921, and in my opinion the authority to act under this law has passed, as it only confers the power upon the Council of State to install and complete "before the convening of the next regular session of the General Assembly" an elevator in the Capitol Building. As this was not done, the power to now do it has, in my opinion, terminated, and I think the power and authority to install the elevator should be renewed before the Board of Public Buildings and Grounds or the Council of State would have the authority to do so.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ENTRIES AND GRANTS—AUTHORITY OF SECRETARY

July 24, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. L. P. DENMARK.

DEAR SIR:—It has been held in quite a number of cases in North Carolina, particularly *Wool v. Saunders*, 108 N. C., 730, as follows:

The entry takers and surveyors of the several counties are sworn officers charged with important duties in respect to the subject, and if it appears from the warrant and survey that they have discharged these duties, and if the claimant has in all other respects complied with the law, the Secretary has no discretion and must issue the grant. To permit or require the Secretary to go behind the *prima facie* right of the claimant and determine whether the land is subject to entry, would necessarily involve an inquiry into the legal or equitable rights of other parties claiming under prior entries or grants, or by adverse possession and thus a new tribunal, unknown to the

Constitution and laws, would be erected for the investigation of titles to real estate, the practical workings of which would be productive of inestimable conflict, uncertainty and confusion. The trial of such questions is wisely left to the courts after the grant is issued, the grant being voidable if irregularly issued, and void if the land is not subject to entry.

Under this ruling, we think that the fact that the land appears upon the face of the entry to be included in the limits of an incorporated town would not vary the rule. Of course, if this land has heretofore been granted by the State of North Carolina or its predecessors in title, the Kings of Great Britain, the grant issued by you now would be absolutely void under C. S., sec. 7545.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

WOMENS CLUB—ORGANIZATION TAX

July 24, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MISS MARY BRADLEY.

IN RE: *Certificate of incorporation of the Woman's Club, Winston-Salem, N. C.*

DEAR SIR:—This is a non-stock, non-profit corporation, the purpose and object of the corporation being as follows:

To promote and encourage education, literature, the sciences and arts, to render aid and service to charities, take part in all civic affairs affecting public interest and to participate in all movements connected with the general welfare of the community.

You inquire upon this whether this corporation is subject to the filing tax provided by C. S., sec. 1218, as amended by Chapter 1, of the Extra Session of 1920. We think not, for two reasons: *First*, the section expressly provides:

No such taxes need be paid by a benevolent, religious, educational or charitable organization with no capital stock.

This corporation seems to be both educational and charitable. *Second*, it is a non-stock, non-profit corporation proposed to be organized for public and beneficial purposes. Under such circumstances, it being a non-stock corporation, there is no rule by which you could measure the amount of the filing tax. Chapter 116 of the Public Laws of 1921, providing for the organization of corporations with stock without nominal or par value and further declaring in section 5 that the tax upon the certificate of incorporation shall be the same as if each share of stock had a par or face value of \$100.00 applies only to corporations organized for profit.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—PUBLIC SERVICE—ORGANIZATION

July 25, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*IN RE: *Certificate of Incorporation of Archdale Company.*

DEAR SIR:—You inquire whether or not the object stated in this certificate in sub-section (c) of section 3 thereof can be legally incorporated in the certificate of such company. The Legislature has not seen fit to deal with this question, so far as we have been able to ascertain. Omitting from consideration certain classes of associations and so-called corporations which do not affect this question, we know no businesses which cannot be incorporated under the general corporation law, except railroads, other than street railway or banking or insurance or building and loan associations. The fact that public service corporations may exercise the power of eminent domain does not prevent their incorporation by your office, except those named above.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANK CHECKS—PAYMENT

August 8th, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

DEAR SIR:—It seems that you were given checks on the Planters Bank & Trust Co., amounting to \$75.00 in payment for license tax on certain automobiles. These you in the usual course of business deposited in a Raleigh bank. This bank sent them to its correspondents for collection. They were presented to the drawee bank at Burgaw for payment, and that bank paid them by a draft on the Murchison National Bank at Wilmington, marked the checks paid and surrendered them to the drawer. You inquire whether or not the drawer, the Planters Bank & Trust Co., having failed, and the Murchison Bank, refusing to honor the draft for that reason, is discharged of any liability to you. Stated in another form, has the person giving the checks, under these circumstances, paid the license tax for the operation of the automobiles during the coming year?

We think it quite clear that he has. In giving the checks the drawer of them undertook that they should be paid upon presentation to the Burgaw Bank. They were presented to that bank and were paid. It is suggested, however, that the reason for this rule, i.e. that the presenting agency had authority to accept the draft on the Murchison Bank, in lieu of cash, had been abrogated by the par clearance act of 1921 (Chap. 20, Pub. Laws), particularly by section 2 thereof. So far as material that section is as follows:

... all checks drawn on banks chartered by this State shall, *unless specified on the face thereof to the contrary by the maker thereof*, be payable at the option of the drawee bank in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any reserve bank or any agent thereof.

We do not regard this statute as modifying the rule for two reasons:

First. The payee of the check may refuse to receive it as payment for an existing obligation unless the notation permitted by the statute is made by the drawer at the time the check is tendered.

Second. It is said in *Farmers and Merchants Bank v. Federal Reserve Bank*, 67 Law Ed. at 742: "Laws which subsist at the time of the making of a contract, and where it is to be performed, enter into and form part of it as fully as if they had been expressly referred to, or incorporated in its terms . . . Since the provisions of section 2 bind the drawer, they bind the payee, and every subsequent holder . . . For the holder of a check has, in the absence of acceptance by the drawee bank, no independent right to require payment under the general law."

The payee then accepts the check with knowledge of this law, and doing so without requiring the notation, he knows that it may be paid by draft, and by the mere course of business he, in effect, thus authorizes his collecting agent to accept the draft in payment.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ENTRIES AND GRANTS—LAND COVERED AT HIGH TIDE

August 27, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. L. P. DENMARK.

DEAR SIR:—We have examined the papers in the matter of the entry of Milan Fulcher and James Styron. C. S., sec. 7540, expressly declares that lands covered by navigable waters are not subject to entry. What are navigable waters is a question of fact. It seems that these gentlemen have entered a tract of land in the eastern part of Ocracoke Inlet. At medium flood-tide all of this land is covered by water except about five and one-half acres. As we understand it, these five and one-half acres are covered at high tide. If these are the facts in the matter, we think this so-called land is not subject to entry. We are not informed as to whether Ocracoke Inlet is used or has been used within the history of the country as an entrance from the ocean to Pamlico Sound, but suppose it has been so used. If so, these temporary sand mounds exposed at low tide and covered at high tide are part of the original inlet and are liable to be removed at any time that the State or Federal Government should determine to improve the inlet.

We think, then, as at present advised, that this land is not subject to entry under the entry laws of North Carolina. See *Bell v. Smith*, 171 N. C., 116, and *Barfoot v. Willis*, 178 N. C., 200.

We return the papers herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—DISSOLUTION

October 5, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*IN THE MATTER OF *the dissolution of the Ballenger Company.*

DEAR SIR:—In yours of October 2d you state that this corporation doing business at Tryon, N. C., filed a proper written assent for its dissolution in your office and the first certificate was issued September 13th. This certificate had not been recorded in the office of the Clerk of the Court nor published in the newspapers as required by C. S., sec. 1182. In this state of affairs it seems that the stockholders had changed their minds about the dissolution of the corporation, and desire to continue its corporate existence. You ask the opinion of this office as to whether they could under the circumstances hold up the dissolution proceedings, or whether they would have to reorganize and incorporate again.

The authority to dissolve a corporation voluntarily must be pursued strictly in order that the corporation should be dissolved and its affairs wound up. The statute expressly declares:

Upon the filing in the office of the Secretary of State of an affidavit of the manager or publisher of a newspaper that the certificate had been published, the corporation is dissolved.

In all circumstances, so far as the rights of creditors are concerned, this publication and filing of the certificate in the office of the Secretary of State is a necessary prerequisite to the dissolution of the corporation. The Ballenger Company, then, is in the process of dissolution now. We see no reason why the same stockholders who had voted for dissolution should not now meet and recall the certificate which they have sent to your office, enter these proceedings upon their minutes in the proper way and certify them to you also in the proper way, so that you may make the entry upon your books to the effect that the proceedings in dissolution were not perfected, but that the stockholders recalled the first certificate. That would be in effect, if all the stockholders participated in the second action who participated in the first, a reconsideration of the former action.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MOTOR VEHICLE—CERTIFICATE OF TITLE—SEAL TAX

October 29, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

IN RE: *Your request for my opinion as to whether or not under Chapter 236, Public Laws of 1923, you can charge a seal tax of \$1.00 for certificates of title for motor vehicles.*

DEAR SIR:—After consideration of the above question and a more careful reading of the provisions of the statutes, I am of the opinion that you cannot

charge a seal tax of \$1.00 for the seal attached to the certificates of title for motor vehicles under Section 2, Chapter 236, Public Laws of 1923. The second paragraph of that section reads in part as follows:

The Secretary of State, if satisfied that the applicant is the owner of such motor vehicle, or otherwise entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title over his signature, authenticated by a seal to be procured and used for such purpose. Said certificates shall be numbered consecutively, etc.

The charge for each original certificate of title so issued shall be fifty cents, which charge shall be in addition to the charge for the registration of such motor vehicle.

It would seem from the above quotation of the pertinent part of said section, that the Legislature contemplated that you should procure and use a particular seal or a special seal for the purpose of authenticating the certificate of title for motor vehicles, and not use your regular Secretary of State seal, and that for a certificate with a seal to be procured and used for such purpose, the single charge of fifty cents should be made.

The Revenue Act of the 1923 session, as well as previous Revenue Acts, contains the provision that for the affixing of the Secretary of State's seal to the papers requiring it a charge of \$1.00 shall be made, and the same converted into the general treasury of the State. It was this statutory provision that I had in mind when first advising you that you had a right to charge \$1.00 for the seal used to authenticate the certificates of title for motor vehicles, and the act, to wit: Chapter 236, Public Laws of 1923, provides that a special seal shall be procured and used for this purpose, and that the entire charge shall be only fifty cents for the original certificate of title, which includes the affixing of the special seal.

I think, therefore, that in such cases where you have inadvertently collected \$1.00 for the seal tax for these certificates, that a refund of the \$1.00 should be made.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—DISSOLUTION

November 7, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

IN THE MATTER OF *the dissolution of the Southern Parfay Company.*

DEAR SIR:—The letter of Mr. Stothart of November 3d does not state that the Parfay Company, Inc., had purchased the stock of the Southern Parfay Company proposed to be dissolved. It does state that they had purchased all its property and taken over its liabilities.

The object of the dissolution of the corporation is to relieve it of the necessity of reporting for taxation purposes and to also relieve it in a certain period of time of claims of its creditors. If there is no person living or

existing who can fill up the application for dissolution, we do not know any plan by which the corporation can be voluntarily dissolved. It may be dissolved under the statute for failure to comply with the Revenue Law. If, however, the officers and directors of the Parfay Company took over the stock of the other corporation, they are stockholders in that other corporation for the purpose of dissolution and they, therefore, can follow the statute in dissolving it.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—INCREASED CAPITAL STOCK—TAX

December 21, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—In reply to yours of December 20th.

You state that a foreign corporation with an authorized capital stock of \$1,000,000.00 was domesticated in this State six months ago and paid the license tax of \$200.00 provided by statute, C. S., sec. 1181. Now it files a certificate to the effect that it has been authorized to increase its capital stock to \$1,500,000.00. Upon this you inquire whether you shall collect 20 cents on each \$1,000.00 of the increase, or whether you are limited by the excess amount of \$250.00 as provided in the above cited section.

We think that this limit is operative and that you should collect now only \$50.00 and not \$100.00. In other words, you should collect a tax as though the \$1,500 000.00 capital stock was authorized in its original certificate.

• Very truly yours,

FRANK NASH,
Assistant Attorney-General.

FRATERNAL ORDER—TAX

December 26, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

DEAR SIR:—Your letter of December 26th, enclosing copy of a letter from the Insurance Commissioner with reference to the organization tax upon the Grand Order of Queen of the Orient, a copy of the charter of the above fraternal order being enclosed, is received. You desire to know from me if this corporation is subject to the maximum tax of \$40.00 or whether it comes within the exceptions in the statute, to wit:

No such taxes need be paid by benevolent, religious, educational, or charitable organizations with no capital stock.

Under Chapter 106, Article 25, sub-chapter 6, this corporation is clearly a benevolent fraternal order and in my opinion is not subject to the minimum tax of \$40.00, it having no capital stock and the benefits are not to exceed

\$300.00 to any one person, and it professes to be organized on the non-profit basis.

I return herein the papers enclosed.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—BANKRUPTCY

December 28, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

DEAR SIR:—The fact that Bailey Brothers, Inc., was adjudicated a bankrupt on December 15, 1923, of its own force forfeits a State charter of that corporation. We think the receivers should send you a certified copy of the judgment adjudicating the corporation a bankrupt, and from that you could make the proper entries upon your record which would show that it was no longer a corporation of North Carolina. The Supreme Court of North Carolina applied the above mentioned section, 1190, in *Stagg v. The Land Company*, 171 N. C., 583. .

We return herewith the letter of the receivers.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—DISSOLUTION—LAPSE OF TIME

January 17, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—We think your opinion that it is not necessary to have a dissolution of a corporation in the regular way when its corporate existence has expired by the lapse of time fixed in its charter, is correct. Our own Court has decided that a corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such cause. It has been held by courts of other states that no action on the part of those in charge of the business affairs of the corporation is necessary to effect a dissolution after the expiration of the statutory period. 14a, C. J., p. 1099.

It seems that in the case of the Long Island Cotton Mills, in Catawba County, its stockholders have pursued the plan adopted in *Friedenwald v. Tobacco Works*, 117 N. C., 544. We think, then, that you would keep your records straight by noting the fact that this corporation had been dissolved by the expiration of the time for its legal existence.

We return herewith Mr. Feimster's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—INSURANCE COMPANY

January 22, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—You ask the opinion of this office whether or not a company can be incorporated under the general incorporation laws with the words “insurance company” as part of its corporate name, when the corporation does not carry the risks, but merely acts as agent for other insurance companies.

We found no statute which expressly prohibits this, but we think such a company should not be incorporated purporting to be an insurance company when in reality it is not. C. S., sec. 6328, requires all corporations organized to do an insurance business to have the words “insurance company,” “insurance association” or “insurance society” as part of the title of such corporation. The effect of this statute, we think, is by necessary inference to exclude other corporations from the use of these words in their titles when they do not do an insurance business as defined in Chapter 106 of the Consolidated Statutes.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTIES—GASOLINE TAX

February 5, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*ATTENTION OF MR. J. E. SAWYER, *Motor Supervisor.*

DEAR SIR:—I have your letter of January 28th, enclosing letter from Mr. Paul J. Barringer to you under date of January 24th.

Mr. Barringer is chairman of the board of commissioners of Lee County, and his county proposes to buy gasoline outside of the State, have it shipped to the county in car lots and stored in tanks belonging to the county, and used for the upkeep of the roads in Lee County.

Of course, this gasoline would be subject to inspection taxes. As it is to be used in motor vehicles, I do not see why it is not subject to a tax of 3 cents per gallon. If every large consumer of gasoline in the State (and by consumer, I mean person or corporation using gasoline for motor vehicle purposes) were to import his own gasoline, store it in his own tanks and use it in his own motor vehicles, where would the State get its tax to build and maintain the roads that it is now constructing? The State Highway Commission, I recall, took this position at one time. The matter was submitted to me and I advised against it, and I understand it has paid the tax on gasoline used by it for motor vehicle purposes since.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE INSTITUTIONS—BORROWING MONEY

March 18, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*IN THE MATTER OF *the chapel at Samarcand.*

DEAR SIR:—In reply to yours of March 17th. We think the trustees of Samarcand Manor have not authority to execute a mortgage on the property to secure a loan to complete this building whose erection was undertaken by the King's Daughters. We know of no other way by which money so borrowed could be secured except by personal security. If, however, the trustees have not exhausted the funds appropriated by the Legislature for permanent improvements, we think the erection of such a chapel would come within the designation of permanent improvements.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE DEPARTMENT—EXPENSES OF EMPLOYEES

March 18, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

DEAR SIR:—Replying to your letter of the 17th inst., in which you write that you have found it advisable to send your chief clerk, Mr. M. D. Abernethy, to Robbinsville to ascertain facts upon which you were to base your judgment as to renewing the charter of the Graham County Railroad which power had been conferred upon you by Chapter 245, Public Laws of 1923, in my opinion, whenever the Legislature confers upon the head of any department of the State a duty which involves the exercise of judgment based upon the ascertainment of facts, such act of the Legislature necessarily carries with it the right to incur the necessary expenses to ascertain the facts, and also the right to call for the payment of those expenses. Certainly, the Legislature could not mean that in this instance as illustrated, you should personally pay the expenses necessary to be incurred in order to ascertain facts upon which you were to base your judgment.

So, I am clearly of the opinion that the expenses incurred by Mr. Abernethy should be refunded to you by the State. C. S., sec. 7631, seems to contemplate just such a situation as that presented by the case stated by you.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COÖPERATIVE ASSOCIATIONS—ACT OF 1921

May 16, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—Referring to your memorandum attached to letter of Mr. Edgar W. Pharr, enclosing application for charter of the Providence Road

Coöperative Association, the charter seems to be drawn under sub-chapter 4, Chapter 93, Article 13, of the Consolidated Statutes and this sub-chapter authorizes clearly the use of the word "coöperative" as a part of the charter name of the association.

Unfortunately, however, the Legislature of 1921, Chapter 87, Section 21, restricted the use of the word "coöperative" in the charter name to corporations and associations organized under the provisions of that act. While there is no general repealing clause in the act of 1921, still the provisions of section 21 of that act are highly restrictive and in addition, it provides that any person, firm, corporation or association which has the word "co-operative" as part of its charter name is required within six months to eliminate that word.

The Legislature will have to straighten this matter out; I cannot.

I am returning herein the papers.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MOTOR VEHICLE—LICENSE

May 22, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. J. E. SAWYER, *Motor Supervisor.*

DEAR SIR:—Your letter of the 9th inst., enclosing letter from Mr. L. D. Farrow, Sheriff of Dare County—which letter I return to you herein—received.

Section 30 of Chapter 2, Public Laws of 1921, declares:

Any person, firm or corporation that shall operate any motor vehicle upon any highway of the State without license as is required under this act, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

It would seem from this that any motor vehicle used upon any of the highways of the State (and by highways it is not restricted to the State roads composing the State Highway System, but any public road or highway of the State) is required to obtain a license from your Department. If there are no highways in the territory referred to in the letter of Sheriff Farrow, I do not think that the automobiles operating in that territory would be required to take out a license.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATIONS—PURCHASE OF STOCK

June 10, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—Yours of the 9th inst., enclosing letter of Mr. Frank D. Hackett of North Wilkesboro, is received. I am returning the letter herein.

If one of the corporations mentioned has the power under its charter to purchase the stock of other manufacturing companies that are going concerns, I see no reason why they cannot purchase the stock of the two other manufacturing companies and carry on the business under the three corporate names. The control of the stock of the other two companies would not amount to the liquidation of their businesses.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATIONS—PROXIES

June 24, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

IN RE: *Amendment to the charter of China American Tobacco and Trading Company.*

DEAR SIR:—We think it quite clear that the stockholders of a corporation may vote by proxy to amend the charter of the corporation in two instances: First, where the proxy is specific to do the very thing to be done; and second, where it is general, authorizing the proxy to vote whenever and in such way as that the stockholder himself might vote. It will be well in the particular case to ascertain the extent of the proxy held by Mr. L. L. Gravely to vote in the particular instance in behalf of the alien stockholders.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

TRADEMARK—ONE PRODUCT

June 14, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY, *Corporation Clerk.*

DEAR SIR:—We have considered the application of the Canada Dry Ginger Ale Company to register three trade marks which relate only to one product, i.e., their ginger ale. It is doubtful under our statute whether applicants can register more than one trade mark for a specific article. Our Court has never dealt with the subject, but we find that the Federal Courts have sustained the taking out of more than one trade mark for a single article in *Enoch Morgan Sons Co. v. Ward*, 152 Fed. Rep., 690. The applicant in this case, of course, takes the risk of the trade mark not being properly registered under our statute. Its object in thus taking out three trade marks for one article is to prevent the operation of the rule that a trade mark is not infringed by the use of part of a mark which is protected under the trade mark act, but is only infringed when that part is used in connection with something similar to the other part of the trade mark.

We advise, therefore, that the three trade marks in the particular case be

registered as there is nothing in the character of these marks which prevents their registration under our statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TRADE MARK—STANDARD

June 20 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

IN THE MATTER OF *the trade mark "Standard," of the Standard Oil Company.*

DEAR SIR:—The right of this company to register its trade mark in North Carolina is clear. The prohibition against using the same trade mark used by a prior applicant applies only when it relates to the same class of goods. The trade mark here is for petroleum products generally. The fact that the Standard Motor Truck Company of Detroit has registered the word "Standard" in its application to motor trucks does not prevent the Standard Oil Company from registering the same trade mark as applicable to petroleum products.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—EXEMPTION

July 25, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. MAX D. ABERNETHY.

IN THE MATTER OF *the certificate of the Farmers' States Right League, Inc.*

DEAR SIR:—In section 3 of this certificate the objects for which this corporation is formed are stated in part as follows:

Sub-section (a). To promote States Rights and to combat the encroachment of Federal bureaus upon activities reserved by the several states.

In article 4 of the certificate it is stated:

This corporation being solely for educational purposes, shall have no capital stock.

As you say in your letter of July 24th, in stating the objects, the proposed company states a conclusion of fact and not the facts themselves in such way as you can determine that the corporation is for educational purposes. No doubt the purpose of the draftsman was to secure an exemption from taxation upon the certificate as the corporation is to be formed for educational purposes. The certificate should show, however, such facts as will

enable you to determine whether it is for educational purposes within the exemption of the statute, and no such facts are stated in this certificate.

We return the papers herewith.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

CORPORATION—AMENDMENT—TAX

July 30, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

DEAR SIR:—You state in your letter of July 28th:

The Lincoln Theatres Company was incorporated by this office with an authorized capital stock of \$1,200.00, on which the minimum tax of \$40.00 was charged. Before any capital stock was paid in and before organization was perfected, an amended certificate was filed increasing the capital stock to \$40,000.00, as provided in Section 1130, Consolidated Statutes. Do you interpret this section to mean that on this amended certificate we should charge an additional tax on \$40,000, the minimum tax, plus the fees?

We interpret Section 1130 of the Consolidated Statutes as permitting you to charge in the particular case an additional tax of \$40.00 plus the fees. The statute concludes as follows:

Except when the certificate is amended by increasing the capital stock, in which case such tax shall be paid upon the increase.

Section 1218, as amended by Chapter 1 of the Extra Session of 1920, also sustains this view.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION—INDUSTRIAL BANK.

August 26, 1924.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

ATTENTION OF MR. M. D. ABERNETHY.

IN RE: *Certificate of Guarantee Loan Company.*

DEAR SIR:—This certificate, in stating the objects for which it is organized, in sub-section (a) declares:

To make, contract for, undertake or enter into loans or advances of money to other corporations, companies, associations, or individuals under the laws of the State of North Carolina, or pursuant to the provisions of the uniform small loan law of the State of Virginia or other states, and to that end to inves-

tigate the employment and responsibility of applicants, appraised property where lien upon such is offered, and search the public records for liens and encumbrances, or otherwise verify any claims of property offered as security and accept repayment in weekly or monthly instalments of principal with interest.

It seems quite clear that Chapter 225 of the Public Laws of 1923 is applicable to this corporation. Section 1 of that act defines an industrial bank as "any corporation organized, or which may hereafter be organized, under the general corporation laws of this State, and which is engaged in lending money to be repaid in weekly or monthly or other periodical instalments of principal sums as a business." Section 4 of the act declares that the capital stock with which any industrial bank shall commence business shall not be less than \$25,000. The Guarantee Loan Company proposes to commence business with \$1,000 preferred stock and five shares of common stock without nominal or par value. The act of the General Assembly which permits the organization of corporations whose stock shall have no par value excludes banks from the privilege. Chapter 116, Public Laws, 1921.

For these reasons we think that such certificate is not in adequate form.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANKS—VOLUNTARY LIQUIDATION

January 17, 1923.

HON. W. N. EVERETT, *Secretary of State, Raleigh, N. C.*

DEAR SIR:—Replying to your letter of the 16th inst., and the question based upon the enclosed letter of Hon. A. M. Scales, beg to advise that in my opinion under Section 15, Chapter 4 of the Public Laws of 1921, a bank is permitted to go into voluntary liquidation and be closed, and surrender its charter and franchise as a corporation by complying with the provisions of said section. It seems to me that when these provisions are complied with, the charter and franchises of the corporation are surrendered. I do not believe it is necessary for it to take any further action.

I herein return the letter from Mr. Scales.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE STATE AUDITOR

COUNTY AUDIT—TREASURER'S FEES

August 30, 1922.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

DEAR SIR:—In yours of August 28th, you state that a question has arisen in one of the county audits being conducted by your Department as to whether or not the treasurer of the county is entitled to commissions on money coming into his hands from bond sales, or from money borrowed by the county; and also, whether he is entitled to commissions upon the disbursement of money so borrowed. And third, as to whether or not he is entitled to commissions on money borrowed by the county from the State Loan Fund.

(1) Is he entitled to commissions upon the receipt of money borrowed by the county, whether the proceeds of bonds or not? The statute, 3910 of the Consolidated Statutes, merely fixes the limit beyond which the board of county commissioners may not go in allowing commissions to the treasurer. This, of course, gives them the power to fix the commissions of the treasurer at an amount less than that specified by the statute. The various special laws authorizing bond issues in counties in some instances, at least, deal with the question of the amount of commissions allowed to the county treasurer. Independent of these considerations, we do not consider the receipt of money borrowed by the county as such a receipt as the statute allows commissions for. The statute contemplates compensation for the receipt of ordinary funds coming into the county treasurer from ordinary sources of taxation. Money that is borrowed is from an extraordinary source. If he were allowed commissions upon this sum, he would get double commissions in this way. The money borrowed has to be repaid. It is to be repaid from the proceeds of the special tax levied for that purpose. Upon the proceeds of this tax he is entitled to the ordinary commission. If he had been allowed a commission upon the receipt of the borrowed money and was then allowed commissions upon the receipt of the taxes levied to pay it, there would necessarily be double commissions; still, without a special act fixed his commissions in case of bond issues, the county commissioners have ample authority to limit the amount of commissions he should receive upon the receipt of the proceeds of the bond issues.

(2) Is the county treasurer to be allowed commissions upon the disbursements of the proceeds of bond sales? Here, also, you must keep in mind the authority of the board of county commissions to fix the commissions upon such disbursements. In the absence of action by the county commissioners in this regard, we think the treasurer would be entitled to commissions upon such disbursement.

(3) Is he entitled to commissions upon money borrowed by the county from the State Loan Fund? It is entirely clear that he is not, for the statute, Section 3910, expressly declares that said treasurer shall be allowed

no commission or compensation for receipts and disbursements of any loan or loans made to the county by the State Board of Education out of the State Literary Fund for the building of school houses.

There may be special statutes for particular counties which fix the fees of county treasurers in all instances except the latter above specified.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY AUDIT—SHERIFF'S SETTLEMENT

September 7, 1922.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

ATTENTION OF MR. RALPH L. STEELE.

DEAR SIR:—It appears that upon examination of the sheriff's office in one of the counties of the State, it was discovered that the sheriff made no final settlement for the taxes of 1917, 1918, and 1919. The sheriff's term of office expired December 1, 1920, and matters were permitted to drift on by the commissioners of this county until February, 1922, when an auditing committee appointed by the county commissioners went over the accounts of the sheriff and found that he owed the county \$2,000, which amount was paid into the treasurer by the sheriff. Under an audit ordered by your office it was discovered that notwithstanding the payment of this \$2,000, the sheriff was in arrears on taxes for the years 1917, 1918 and 1919 very largely in excess of the \$2,000 paid by him.

Upon this you ask: (1) Should this payment of \$2,000 be credited against the arrears of 1917 and 1918 taxes?

Answer: It is the general rule that when an amount is paid upon an indebtedness generally, it is credited upon the first items of that indebtedness unless another application is made by the debtor at the time or by the law itself. We see nothing in this case which prevents the general rule from applying, so this payment should be credited upon the deficiency of 1917 and 1918, and certainly not in whole against the deficiency in the 1919 taxes.

(2) Is the one per cent per month penalty provided for in Section 88 of the Machinery Act of 1919 now chargeable up to the present time and until such time as the balance due by the sheriff for 1919 taxes is paid, or would the settlement of February 2, 1922, have the effect to do away with the penalty at that time or stop its running beyond that period?

Section 108 of the Machinery Act requires the county boards of commissioners at their last regular or other subsequent meeting in each year to appoint an auditing committee from their number to be present at the accounting and settlement between the sheriff and county treasurer provided for in the preceding section. The account so audited shall be reported to the board of county commissioners and when approved by them, shall be filed with the clerk and recorded on his books, and shall be *prima facie* evidence of their correctness and impeachable only for fraud or special error. It is manifest, we think, that a settlement between the county and the sheriff, which is given this *prima facie* effect, is only that provided for by Section 108. The settlement in this case was in no sense such a settlement. The

sheriff retired from office on the first monday in December, 1920, and this settlement was had in February, 1922. This being the case, it is not such a settlement as would be impeachable only for fraud or special error, whatever the latter may be. In other words, it was not a settlement sanctioned by the law.

Section 88 of the Machinery Act of 1919 for the first time provided a bonus for the prompt payment of taxes and a penalty for delayed payment of taxes. It seems that the sheriff in this instance collected only a few of the penalties when in January, 1920, he was instructed by the board of county commissioners not to collect this penalty. Of course, this order by the county commissioners in reference to the taxes of 1919 was illegal and would constitute no defense for the sheriff for failure to collect the penalty from delinquent taxpayers and no excuse for him not being charged with the penalty which the section expressly imposes upon him for failure to settle in full for the taxes collected by him within the time fixed by law. This penalty, then, is in law a valid charge against the sheriff for failing to settle the taxes of 1919. For the taxes of 1920 there was no penalty imposed, either upon the taxpayer or the sheriff, for delayed payment of the taxes collected except the general penalty, Sections 104 and 105 of the Revenue Act. Section 107 of the Machinery Act allows the board of county commissioners to extend the time for the collection and settlement of county taxes to May 1st in the year following in which taxes were levied. They are not allowed to extend that time further.

So far as the facts appear in the statement made to this office, the sheriff of this county has made no such settlement with the commissioners of the county as would prevent the imposition of these penalties for failure to settle the taxes of 1919 as provided in the Machinery Act of that year. So far as any penalty incurred by him in failing to settle the State taxes for the year 1919, they may probably be remitted under section 106 by the Treasurer and the Attorney-General, if the proper case is presented to them.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTE—SPECIAL APPROPRIATION

March 19, 1923.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

DEAR SIR:—A statute entitled "An act for the relief of Mrs. Bradley Cribb of Columbus County" was ratified by the recent General Assembly, March 2, 1923. That statute—after reciting that Bradley Cribb, an officer of Columbus County, was killed on the night of January 26, 1923, by Bob Williams, a long-term convict in the State's Prison, as he was attempting to arrest him; that while Cribb was so slain he wounded Bob Williams and in consequence of that wound, Williams's capture was made possible; that Bradley Cribb left a wife and mother-in-law who were dependent upon him and no property of any appreciable amount to support them after his death—declares "that the sum of \$400.00 is hereby appropriated to Mrs. Bradley Cribb in lieu of the usual reward paid in such cases and the further sum of \$100.00 is ap-

propriated to Mrs. Bradley Cribb to cover funeral expenses incurred in the death and burial of her husband, and if there is any balance from the above expenses, such money to be used by Mrs. Bradley Cribb."

The act was made effective from and after its ratification, and as above stated, it was ratified March 2, 1923. There is no direction in the act itself that these sums shall be paid from the State Treasurer, there is no direction to the State Auditor to issue his warrant payable to Mrs. Cribb for said sums, and no direction to the State Treasurer to pay said sums to her upon presentation of the warrant. There is nothing in the Constitution which prohibits the enactment of this law, there is nothing in the Constitution which requires that these directions should be given to the Auditor and the State Treasurer whenever appropriations are made. If, therefore, the omission of these directions from this act should be held to invalidate it, it would be a total disregard of the manifest intention of the Legislature to compensate to some extent Mrs. Cribb on account of the loss of the life of her husband when engaged in the performance of his public duty. An interpretation must never be adopted which will render the act ineffectual or defeat its purpose if it will admit of any other reasonable construction. It must be presumed, therefore, from this act that the Legislature intended that these sums should be paid from the State Treasury through the ordinary channels by and through which such sums are paid. We think, therefore, that this act confers authority upon you to issue the necessary warrants to Mrs. Cribb and the necessary authority upon the State Treasurer to pay the same upon presentation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JUDGE'S COMPENSATION

July 23, 1923.

MR. W. L. PLOTT, *State Auditor's Office, Raleigh, N. C.*

DEAR SIR:—You ask this office what is an allowable compensation for the judge of the juvenile court of the county, and how it is to be paid. C. S. sec. 5059, answers this question very clearly and distinctly:

The judge of the juvenile court shall be paid a reasonable compensation for his services, the amount to be determined by the county commissioners, and the amount thus determined by the county commissioners shall be charged against the *public funds of the county*. And such compensation shall be independent of any compensation which may come to him as clerk of the superior court.

This statute contemplates that the board of county commissioners shall provide a fixed sum as compensation for the judge of the juvenile court, which fixed sum must be reasonable in amount considering the circumstances in the county and the amount of work to be done by the judge, and the sum so fixed is to be paid out of the general funds in the county treasury. We think this statute is so definite that the county commissioners would

not have authority to allow the judge of the juvenile court fees from whatever source derived, instead of a fixed salary.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE AUDITOR—DRAINAGE BONDS

August 28, 1923.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

DEAR SIR:—Mr. Junius D. Grimes of Washington, N. C., in his letter of August 24th to you, inquires whether or not Chapter 1, Public Laws, Extra Session of 1921, as amended by Chapter 123, Public Laws of 1923, applies to bonds of drainage districts organized under C. S., secs. 5312 to 5381.

It is evident, we think, from the terms used that the General Assembly intended to make this regulation of the issue and sale of bonds apply to all subordinate governmental agencies. The terms used are, it seems to us, broad enough and inclusive enough to comprehend all of this general class.

Chapter 7, Public Laws of 1921, in section 2, declares:

That the State having authorized the creation of drainage districts and having delegated thereto the power to levy a valid tax in furtherance of the public purposes thereof, it is hereby declared that drainage districts heretofore or hereafter organized under existing laws or any subsequent amendments thereto are created for a public use and are political sub-divisions of the State.

It is noticeable that both sections 1 and 2 are amendments to the sections of the Consolidated Statutes referred to by Mr. Grimes.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGH SCHOOL TEXT BOOKS

October 25, 1923.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

DEAR SIR:—In reply to yours of October 23d.

It seems quite clear that the expense of the State committee on high school textbooks under section 334 of the new school code should be paid out of the general funds of the State. It is declared in that section that this committee shall serve without pay except reimbursement out of the State Treasury upon the requisition of the State Superintendent of Public Instruction for actual expenses incurred by attendance upon meetings of the committee that may be called by or under the direction of the State Superintendent of Public Instruction.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

PENSIONS—WIVES OF DECEASED PENSIONERS

February 9, 1924.

MR. E. H. BAKER, *Chief Clerk, Office of State Auditor, Raleigh, N. C.*

DEAR SIR:—It seems to us that the difficulty you are having with delayed applications for payments to widows of pensions due their deceased husbands for one year after the death of the husband is largely a question to be solved by administrative process, rather than a question of law.

Section 19 of the Pension Act, Chapter 89, Public Laws 1921, orders all pensions due to Confederate Soldiers to be paid to their widows for a period of one year after the death of the pensioner, but limits the amount to a widow's pension as prescribed by law. Of course, your office should be notified immediately upon the death of the Confederate Soldier in order that you may make out the pension warrants in accordance with the provisions of section 19. If you are not notified during the year after the death of the pensioner but are notified after the period has elapsed, and you are satisfied from the evidence that the widow is really one as described in section 19, we see no reason why you should not make the payment to her as required by that section, though the period of one year has elapsed, provided, of course, the funds appropriated by the Legislature for the payment of pensions have not been exhausted in paying those which come in regular course of official business.

There is a proviso to section 20 which it seems may be made applicable to such condition:

That hereafter all moneys provided or appropriated in any one year for ex-Confederate Soldiers, sailors or widows not paid out to them in any one year shall revert to the pension fund of the State and should be paid out to them in the next year in the class to which they belong.

This, of course means that if the fund for the particular year is not exhausted, it is not converted into the general fund of the Treasury but is kept intact as part of the pension fund to be distributed the next year, in increase, if it may be, of the pension regularly granted. The claims of these widows properly founded are, of course, legal claims against the State and should be met if they are made within a reasonable time, if the funds are available for that purpose.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY AUDIT—SPECIAL FUND

March 15, 1924.

BUREAU OF COUNTY AUDITING, *Office of State Auditor, Raleigh, N. C.*

ATTENTION OF MR. G. S. HARRILL.

DEAR SIR:—Where there are special funds to be applied to special purposes or taxes specially levied for that fund at the time of the collection and pay-

ment of the same into the county treasury, the fund for which they are collected should be designated and the proceeds applied only to that fund.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SHERIFFS—COMMISSION ON LAND SALE

January 29, 1924.

HON. BAXTER DURHAM, *State Auditor, Raleigh, N. C.*

ATTENTION OF MR. O. F. GODDARD.

DEAR SIR:—In reply to yours of January 29th.

You inquire whether or not sheriffs should be allowed a commission on land sales in your settlements with them. The object of a land sale is to collect the taxes formerly due the State and now due the county. The sheriff's fees upon the sale both of personalty and realty are defined in C. S., sec. 8009. Those fees are collected by the sheriff at the time of the sale, if the sale is perfected. If not perfected, they are provided for in the redemption of the land by the owner. Wherever, too, there is no salary act making it otherwise, the sheriff is entitled to the commissions upon the collection of the taxes in this way. If, however, the land at the sale is bid in by the county, it in effect amounts to the county taking the land for the taxes unless the same is redeemed within the statutory period. The cost to which the sheriff is entitled in such cases has been fixed in sections in the Machinery Act for several years. In the Act of 1923 it is section 100. When he settles with the county, he is allowed to deduct all insolvents and uncollectible poll taxes, and also the amount of county tax on lands bid off by the county.

It is manifest, therefore, that the sheriff is not entitled to commissions on land sales *per se*, and in the case last mentioned, he is not entitled to commissions on the taxes of the defaulting landowner because he has not collected them, and is allowed a deduction from his tax list for the amount of such taxes.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY AUDIT—SINKING FUND

May 30, 1924.

MR. J. S. ROBINSON, *State Auditor's Office, Raleigh, N. C.*

DEAR SIR:—Yours of May 29th is received.

In my opinion, the board of county commissioners of the county, except where otherwise expressly directed by statutory provisions, have control over the loaning of county sinking funds, and should pass upon the sufficiency of the security offered, making a record in their board minutes of such action.

In the act to which you refer, to wit: Chapter 197, Public-Local Laws of 1913, section 31, it is provided, however:

And to increase the due investment of the above described amount from time to time, it shall be the duty of the treasurer of said highway commission under such regulations as said commission may prescribe to make investment of said amounts and to do and perform all other services in connection with said bonds as said highway commission may prescribe.

So, it would seem from this provision that the investment of the sinking fund is in the hands of the highway commission by the express provisions of the statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

PENSIONS—RETURN OF WARRANT

August 18, 1924.

MR. E. H. BAKER, *Pension Clerk, State Auditing Department, Raleigh, N. C.*

DEAR SIR:—Mr. J. A. W. Sharp, Deputy Clerk of the Superior Court of Iredell County, states the following facts to you in his letter of August 9th:

Mr. James M. Crawford, an ex-Confederate Soldier, drawing a pension, died on January 27, 1924, and left surviving him a widow, Mrs. Adeline Crawford, who died on May 7, 1924. Upon this you inquire whether or not the June pension check (1924) can be delivered to either the estate of J. M. Crawford or that of his widow, or whether it will have to be returned to your office.

Section 18 of the pension laws allows the pension check for June of the current year to be paid to the estate of the pensioner if he dies after the 15th of April. Section 19 provides that all pensions due to Confederate Soldiers shall be paid to their widows for a period of one year after the death of any such pensioner, provided that the amount paid shall not exceed the widow's pension as prescribed by law.

It is apparent, we think, that neither one of these sections applies to the condition stated above. Therefore, the warrant should be returned to your office for cancellation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE STATE TREASURER

TAXATION—DEALERS—AGENTS

August 17, 1922.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

IN RE: *Corley Company.*

DEAR SIR:—There are two questions put by the above company in their letter to you of August 1st.

1. Would the fact that a man buys merchandise from them, a company that deals in musical instruments, entitle him to operate under their license (Sec. 69 of Revenue Act), or, in other words, would he be their agent in the meaning of the law, though he buys f.o.b. Richmond and pays them for the same?

Answer:—Very clearly, No. Under the statute the company after taking out the license may appoint an unlimited number of agents, and obtain a duplicate license for each of them. An agent is one who acts for another, and the sales made by any and all of these agents must be accounted for by the company in estimating its sales tax. An independent dealer, however, sells for himself only, and so is himself liable for the license and sales tax.

2. The company in all cases must account for the sales tax on all sales made by its agents. If it chooses to appoint a person who is at present an independent dealer, its agent, then he must sell as agent, with his sales accounted for as are those of any other agent. He cannot be an independent dealer and agent at one and the same time.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—MOTOR VEHICLES—DEALERS

September 16, 1922.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

IN RE: *Stutz Motor Company License.*

DEAR SIR:—It appears that Mr. Gower of the Motor Service Company, Raleigh, N. C., sometime ago sold a car manufactured by the Stutz Motor Company, being under the impression at the time that that company had taken out State license. On demand by you for a license tax from him, he, it seems, attached certain funds of the Stutz Motor Company in the Merchants National Bank. We think any controversy that Mr. Gower may have with the Stutz Motor Company does not concern you or the State. Mr. Gower or his company, the Motor Service Company, is, we think, liable for the \$500.00 license tax. Upon payment of this tax, we suggest that you remit the penalty for sale without having license and issue to him license

to sell Stutz cars in the State of North Carolina, with authority to issue such duplicate licenses as he may please under section 72 of the Revenue Act.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE DEPARTMENTS—DEPOSIT OF MONEY

June 8, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—Referring to our conversation this morning.

C. S., sec. 7629, requires any State officer who collects money for the State to pay the same to the State Treasurer on the tenth day of the calendar month next following the collection. A State officer collected money during the month of May which he deposited temporarily in a State bank, the deposit being secured by adequate bonds, now in your possession as State Treasurer. The bank, pending the period in which the money is to be paid over to you, was placed in the hands of a receiver. You inquire whether or not, in the opinion of this office, the State officer, pending the receivership or the collection of the bonds deposited with you as security, is required to pay over this money out of his personal funds, in order to comply with the above quoted section.

The bank in the particular case was a depository authorized by you and dealt with you on this basis by giving you the bonds to secure this deposit. The statute recognizes the legality of such deposits for temporary purposes. The State is amply secured from any loss in the particular instance. If the officer should be required to pay into the Treasury on June 10th the money so collected by him during the preceding calendar month and deposited temporarily as aforesaid, out of his own assets, it might become ruinous to him. In the present instance the amount is comparatively small. If it had been as much as \$50,000 and the officer should be required to pay it into the Treasury on June 10th, to realize upon his property in this limited time would be to sacrifice all that he has to conform to this requirement. We think the Legislature did not intend any such condition as this would result in. The inability to comply when not in fault, as was the case in the particular instance, would be a defense against this requirement, particularly when the officer had followed the usual course of business in dealing with these funds and did not participate in any way in the failure of the bank.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE PARK—PURCHASE OF ADDITIONAL LAND

July 25, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—Referring to the matters contained in a letter from Col. Joseph Hyde Pratt, dated June 15, 1923, which is herein returned to you with other papers in connection therewith, which you enclosed, I beg to advise that in

my opinion the balance remaining of the appropriation of \$20,000 authorized in Chapter 76, Public Laws, 1915, cannot be used by the North Carolina Geological and Economic Survey. The appropriation was in an amount not exceeding \$20,000, and I think the preamble of Chapter 316 of the Public Laws of 1919 creating the Mount Mitchell Park Commission recognizes the fact that all land necessary in the opinion of the Mitchell Peak Park Commission, created by Chapter 76 of the Public Laws of 1915, had been acquired. The act of Chapter 316, Public Laws of 1919, created the Mount Mitchell Park Commission as an administrative board, and the duties of this administrative board were transferred to the Geological Survey by Chapter 222 of the Public Laws of 1921, and that board was made the successor of the Mitchell Peak Park Commission. This was done in order to perpetuate the title acquired by this Peak Park Commission. Without additional authority from the Legislature, I do not think you would be authorized to pay any warrant for the purchase of additional land for the park, and I do not think the North Carolina Geological and Economic Survey and Geological Board would have any power to purchase other land.

The two sums referred to in Col. Pratt's letter of \$25 and \$78.30 should, I think, be returned by the Clerk of the Superior Court of Yancey County to you as Treasurer of the State, representing unused sums in the acquisition of land.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATE BONDS—TRANSFER OF REGISTERED

August 21, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

IN RE: *Transfer of Registered State Bonds.*

DEAR SIR:—It appears that forty State bonds, amounting to \$40,000.00 were duly registered by you in the name of Wm. H. McEwan, 1540 West 46th Street, Seattle, Washington. Mr. McEwan died on June 27, 1923, leaving a last will and testament in which his wife, Mrs. Anna B. McEwan, 1540 West 46th Street, Seattle, was made residuary legatee, and was also appointed one of his executors. The executors wish these bonds transferred to Mrs. Anna B. McEwan. Upon this you inquire what the statute requires you to do in the premises.

The statute is Section 4 of Chapter 66, Public Laws, Extra Session of 1921. That section amends C. S., sec. 7405, so as to read as follows:

Section 4. That section seven thousand four hundred and five, Consolidated Statutes, be and is amended as follows:

7405. *Registration as to Principal.* Upon the presentation at the office of the State Treasurer of any bond or certificate that has heretofore been or may hereafter be issued by the State, or upon the first issuance of any bond or certificate, the same may be registered as to principal in the name of the holder upon such register, such registration to be noted on the reverse of the bond or certificate by the State Treasurer. The principal of any bond or certificate so registered shall be payable only to

the registered payee or his legal representative, and such bond or certificate shall be transferable to another holder or back to bearer only upon presentation to the State Treasurer with a written assignment acknowledged or approved in a form satisfactory to the Treasurer. The name of the registered assignee shall be written in said register and upon any bond or certificate so transferred. A bond or certificate so transferred to bearer shall be subject to future registration and transfer as before.

It is manifest from this, we think, that you should require of the executors of Mrs. McEwan's estate a certified copy of his will and a certified copy of his probate and of the qualifications of the executors. Of course, these bonds have to be presented to your office, assigned to Mrs. McEwan by the executors of his estate. This written assignment of the executors should be certified to by a notary public having a seal, or the clerk of the court of record, also having a seal. Upon receipt of these papers, we think you will be justified in registering the bonds in the name of Mrs. McEwan.

We return herewith the file in the matter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTE—INSENSIBLE VOID

July 16, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—In reply to yours of July 16th.

We have examined Chapter 156 of the Public Laws of 1923, and have also examined the statutes with relation to the State's Prison, and the appropriation acts of the recent session, and can find nothing which can throw any light upon that portion of Chapter 156, which declares "The institutions under the control of the board of directors of the State's Prison shall be maintained from legislative appropriations and disbursements on account of these institutions shall be made by the State Treasurer pursuant to these appropriations," etc.

At the time that this chapter was enacted, it is evident that the General Assembly intended to make specific appropriations for the support of the State's Prison, but failed to do so. Left in the condition it is, the act is not capable of construction or interpretation with reference to this feature of it. The rule is, if a statute is devoid of meaning—if the language employed though clear and precise directs an impossibility or is incapable of bearing any reasonable signification, or if an ambiguity exists that cannot be cleared up—so that it is not possible to ascertain the object to which the Legislature intended the act to apply or the result which it was expected to accomplish, the act is inoperative. In such a case the courts cannot revise and amend it on mere conjecture as to the intention of the Legislature but it is their duty to pronounce it incapable of effectual operation. *Black Int. Laws, 2d Ed., p. 154.*

Our own Supreme Court has applied this principle to an act of the General Assembly of 1881, Chapter 234, of the Laws. The act of 1881 prohibited the

sale of liquor within three miles of Mt. Zion Church in Gaston County, and it appears on the trial of the indictment for its violation that there were two churches of that name in the county. It was held that the act was ambiguous, and so was inoperative. *State v. Partlow*, 91 N. C., 550.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE INSTITUTION—APPROPRIATION—PURCHASE OF LAND

September 8, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

MY DEAR MR. LACY:—You asked me a few days ago if any part of the appropriation for permanent improvement or enlargement of State institutions could be used for the purchase of land unless the act so specified or unless the Budget Commission's report so stated. I gave you the opinion that it could not. My opinion was based upon an inaccurate recollection of the Statute, Ch. 232. Laws 1921. Under that statute no part of the maintenance fund can be used, but it is not prohibitive as to the use for such purpose of the fund for permanent enlargement.

So, in this matter, I now advise you that unless prohibited by the statute, or unless the appropriation is definitely made for specified improvements it is competent for the governing body to use a part of it for the purchase of land.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAX—INVOLUNTARY PAYMENT

September 10, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

IN RE: *Chevrolet Motor Car's delinquent Tax.*

DEAR SIR:—In reply to yours of September 8th you state:

The attorneys for the General Motors Corporation, manufacturers of the Chevrolet Motor Car, tender \$500.00 check in payment of delinquent tax; payment made under protest.

You ask the advice of this office upon your acceptance of this payment. I talked with Judge Manning Saturday afternoon in regard to this situation. Both of us agreed that conditions are different now from what they were in 1921, at the time the advice was given to you to refuse payment by manufacturers when tendered under protest. The object there was to collect the tax from the dealer located in the State if the manufacturer refused to pay without protest. Here, however, the offer of payment is made after there is a threat of a levy upon one of their cars for this delinquent tax. Whether, therefore, they paid the tax under protest or not, is not material. If the payment under such circumstances could not be voluntary and if your action in the matter would compel them to pay to save a levy upon a car,

they could pay even without protest and recover it back if your action was illegal.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

STATE TREASURER—STATE OR UNITED STATES BONDS TO SECURE DEPOSITS

October 9, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR MR. LACY:—Your letter of September 26th was duly received, and I have not answered it, owing to your recent illness.

You desire to know from me whether or not United States and North Carolina bonds deposited with you by any bank in the State for the security of funds placed there by you as State Treasurer would have to be returned to the receivers of the bank in case of its failure. If these bonds are placed with you by a bank at the time solvent, I see no reason, and know of no decision that would require the bonds to be returned to the receiver of the bank when it subsequently became insolvent, unless the receiver would be willing to pay the amount due you as State Treasurer. Banks have a right to borrow money and to deposit collateral as their security. The depositing of money by you in a bank is a loan of money to the bank, and the bank becomes your debtor for the amount that you deposit with it. The law requires that you take a bond for the security of your deposit, and I see no reason why you could not accept United States bonds or bonds of the State of North Carolina in lieu of a surety bond to be given by the bank.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

APPROPRIATIONS—FISCAL YEAR—EARNINGS

December 1, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—On the 23d of November, 1917, I gave you, at your request, my opinion upon the following matter, to wit:

Where the Legislature had appropriated a given amount annually to an institution of the State for certain purposes of the State, and only a certain part of that appropriation has been expended or contracted to be expended during the fiscal year, leaving a balance unexpended and uncontracted against, that such amount reverted to the general fund of the State. You will find by reference to that letter that it dealt entirely with appropriations made by the legislature and not with earnings made by certain of the institutions.

The North Carolina School for the Deaf at Morganton advises me that that institution has an earning account and it earns certain sums which are passed through the office of the Treasurer of the State to the credit of the institution, and it desires to know whether or not these earnings are covered by the opinion which I expressed to you in the letter above referred to.

I am aware that the budget commission in ascertaining and determining the amount necessary to maintain any particular institution, considers its other sources of revenue, but in my opinion the question of earnings is not covered by my letter to you, and was not intended to be. I think these institutions that earn some money ought to be permitted to expend that money for the benefit of the institution.

I appreciate another trouble—that is, that the repairs due to ordinary wear and tear of an institution have to be made during the summer vacations and that as the fiscal year closes on the 30th of June, it would be a very great hardship on these institutions to have all of their balance covered into the general funds of the Treasury. I think the institutions ought either to contract for such repairs or ought to submit an estimate to your office as to what such repairs will cost and such amount ought to be left to the credit of the institution.

I am sending a copy of this letter to Dr. E. McK. Goodwin.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE TREASURER—PAYMENT OF WARRANTS—AUTHORITY

February 18, 1924.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—In reply to yours of February 16th.

You ask this office whether or not you have any discretion under Section 7, Chapter 271, Public Local Laws of 1923, in determining whether a warrant issued by the State Auditor is legal or not.

It seems quite clear that that section defines what liability the State is to assume to the State Prison for the use of convicts upon this highway in Madison County. The State Treasurer is to pay a regular per diem for each convict furnished by the State's Prison on this project, the cost of the transportation of the convicts so furnished to and from the project, together with the necessary camp equipment and the cost of the necessary employees sent with the said convicts, and also the cost of the transportation of said employees to and from the project. The machinery provided by the act for determining these questions is as follows:

The Auditor of the State shall issue his warrant to the State Treasurer monthly during the progress of the work upon the presentation by the Superintendent of the State's Prison of an itemized statement of the cost as above defined, which accrued the preceding month.

When this is done and the Auditor issues his warrant, then the statute in its last clause makes it the duty of the Treasurer to pay said warrant. You will observe from this that there are two responsible State officials, the Superintendent of the State's Prison and the Auditor of the State, to determine whether the statute has been complied with in the particulars mentioned above, and if they so determine it, then the warrant is to be paid by you. No doubt, if you have any reasonable grounds for believing that

the warrant includes in it anything not authorized by this section of the statute, you, under your general authority (C. S., 7682) might refuse to pay it as not based upon section 7 as defined therein.

We enclose copy of a letter written by the Attorney-General to Mr. George Ross Pou, Superintendent of the State's Prison, upon this subject.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

APPROPRIATION—FISCAL YEAR—UNEXPENDED BALANCE

March 3, 1924.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

MY DEAR SIR:—It seems that the Eastern Carolina Insane Asylum at Goldsboro did not consume for the fiscal year ending in 1922 their entire maintenance appropriation, but that, foreseeing the enlargement of the institution in the two years following, they by unusual economy and good management were enabled to save a part of their annual appropriation. This was in view of the increased cost of maintenance due to the increase of the number of patients in the institution at some time during the following two years, though the exact time could not be foreseen. And the board of directors in presenting the probable demands of the institution for the biennial period of the Legislature of 1923 took into consideration this amount which they had saved, as above referred to.

The rule which has obtained in your office for many years, and which I think is a wise rule, to wit: that the unexpended balance of annual appropriations should be covered into the general revenues of the State, it seems that the new board of directors did not know of and therefore, could make no provision against.

This matter was discussed today at a meeting of the Governor and Council of State, and it was the prevailing opinion that under the peculiar and extraordinary facts appertaining to this case, that it should be made an exception to the rule of your office. There being no statute of the State which compels you to convert into the State Treasury the unexpended balance of State institutions, I think that the rule of your office would admit of an exception in peculiar cases. I would not by any means suggest an abrogation of the rule in view of the fact that there is no statutory provision about it. In my opinion the rule is an exceedingly wise one and sound one, that the appropriations made by the Legislature to the various institutions of the State dependent upon the State are annual appropriations and made with the view of making fair and just provision for the institution during the current fiscal year, but I am of the opinion that in view of the peculiar facts in this case, that it would be no breach of your rule and no precedent for any other institution to set up in the future, to restore to this institution this balance converted into the general treasury. Otherwise, the institution will be compelled to borrow money and pay interest on it, and the next Legislature will be confronted with the duty of repaying the borrowed money by an additional appropriation.

You have uniformly ruled, and I have advised you so, to charge against the unused balances any outstanding obligations incurred during the fiscal year then closing, and generally I think, and except in very peculiar cases, this rule ought to be rigidly adhered to, but as herein stated, the facts of the Eastern Carolina Insane Asylum are so peculiar and unusual and extraordinary that I think, as I have stated, the unused balance should be returned to the credit of the institution, and I so advise you.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE REGISTERED BONDS—TRANSFER

May 13, 1924.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—I have read, at your request, the letter of May 10th addressed to you from Ames-Emerich & Company, Chicago, Ill., together with the "irrevokable bond powers" enclosed therewith.

It is my opinion that the enclosed bond powers should be completed. There seems to be a good many blank unfilled spaces in these bond powers, and I see no reason why they should not be filled in. In addition to that the bond powers should be signed by some officer of the corporation and properly attested with the seal of the corporation attached and the execution thereof should be properly acknowledged before some officer authorized by the laws of the State of Illinois to take acknowledgments of deeds and other like instruments.

I would suggest that the bond powers be returned for completion and proper acknowledgement, before making the transfer of these bonds as requested.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

WATER INSPECTION—FEES

August 14, 1923.

HON. B. R. LACY, *State Treasurer, Raleigh, N. C.*

DEAR SIR:—We think the tax levied under C. S., sec. 7059, is primarily to pay the expense of water examination and inspection. If there is any excess above this cost, it goes to the State Laboratory of Hygiene. The fund probably is variable in amount, and so bears none of the characteristics of annual fixed sum appropriated from the general fund of the State Treasury for the support of a particular institution. We think, then, that though all the fund paid into the State Treasury during the fiscal year had not been drawn out by the State Laboratory by the end of that year, it is still available for its support, and so is not covered into the general fund of the State, in accordance with the ruling with reference to specific annual appropriations.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

EMINENT DOMAIN—SCHOOL SITES

September 13, 1922.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have considered the question propounded by Mr. Hagaman in his letter to you of September 8th. It seems that the Board of Education of Watauga County, proceeding under Section 5416, C. S., has condemned a school site. The party to whom the land belonged was not satisfied at the damages allowed him by the Commissioners in the condemnation proceedings and has appealed to the Superior Court. Mr. Hagaman inquires whether or not the County Board may proceed to build on the site, pending the appeal, the damages to be paid as the result of the appeal may determine.

We think that the Board can do so. Sub-section 5 of C. S., 1706, makes Chapter 33, entitled "Eminent Domain," apply to the condemnation by county boards of education. Section 1723 declares in part: "If the said corporation at the time of the appraisal shall pay into the court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal." This clause is applicable and can be used safely when the appellant is complaining of the amount of damages allowed him and not attacking the authority of the board to institute condemnation proceedings. If there is any substantial ground, then, for any doubt as to the authority of the board to act in a particular case and to condemn the particular land, it would be safer to await the result of the appeal. In the other case, however, of an attack only upon the amount allowed the property owner, it would be perfectly safe to pay the sum appraised into court and proceed with the building.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

LAKE WACCAMAW—OWNERSHIP

September 16, 1922.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

IN RE: *Lake Waccamaw.*

DEAR SIR:—We have considered carefully the points raised by Mr. Eric Norden in his letter to you of August 29th. Section 4 of Article IX of the Constitution grants to the State Board of Education (among other things) the net proceeds of all sales of swamp lands belonging to the State. In

1891 (C. S., 7542) the General Assembly granted to the State Board of Education all lands "which may be covered by the waters of any lake or pond." It is very clear, we think, that Lake Waccamaw was conveyed to the State Board of Education by the act of 1891. It is also clear, we think, that Lake Waccamaw does not come within the designation of swamp lands as contained in Section 4 of Article IX of the State Constitution.

In 1911 (C. S., 7544), the General Assembly declared that Lake Waccamaw (among others) "shall never be sold nor conveyed to any person, firm or corporation, but shall always be and remain the property of the people of the State of North Carolina, for the use and benefit of all the people of the State." The latter act, we think, plainly conflicts with the act of 1891, and such being the case, we are asked to determine whether or not the act of 1911 destroys the vested right in the State Board of Education in such way as to render it unconstitutional. We think clearly it does not, and there are various reasons for this conclusion. We will state only one:

Section 4 of Article IX of the Constitution deals only with the proceeds of swamp lands *per se*. There is nothing in it which vests any title to great lakes in the State in the State Board of Education. The act of 1891 which vested this title in the State Board of Education, itself very clearly distinguishes between swamp lands and all lands which may be covered by the waters of any lake or pond. Lake Waccamaw is, then, not a swamp land within the designation of the Constitution. This being true, the act of 1911 can in no sense conflict with the Constitution. The General Assembly has ample power to deal with the property of the State and to transfer its administration from one department of the State Government to another, except where there is a restriction upon such power in the Constitution itself, and we have seen that there is no restriction here. Thus, the title to Lake Waccamaw is now in the State and not in the State Board of Education.

It appears from Mr. Norden's data that the lake is about to be irreparably damaged as a lake. Whether or not the State itself shall interfere under these circumstances is a question for the determination of the Council of State, in conference with the Governor.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

P. S. We return herewith Mr. Norden's letter and map.

COUNTY BOARDS—BORROWING MONEY

October 5, 1922.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. Wright, dated September 30th, to you. The scheme that he suggests is, we think, not legally workable. He says that the board of education of Carteret County will lack about \$50,000.00 to enable it to do the work in the county that it desires to do. He wishes to know whether or not the board of education, jointly with the county commissioners, may borrow this sum, with the indebtedness to run

for ten years, without the approval of a majority of the qualified voters in the county.

The Constitution, in Article IX, requires the board of county commissioners to levy sufficient taxes to run the schools of the county for six months. The machinery by which sufficient taxes are to be estimated is set out in the statute. If in making this estimate it falls short of the amount necessary, through inadvertence or miscalculation, we think the board of commissioners have authority to borrow sufficient money to supply the deficit, but that in the ensuing year they must not only levy sufficient taxes to run the schools for that year, but also to take care of this deficit. This is the limit of the authority of the board of county commissioners in the opinion of this office. Consequently, we know no way by which Mr. Wright's suggestion to borrow \$50,000.00 can be legally put in effect.

We return Mr. Wright's letter herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY BOARD—CHANGE OF DISTRICT

October 9, 1922.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN, *Secretary.*

DEAR SIR:—We have considered Mr. Barnes's letter of October 3d. For the purpose of discussing the matter presented by him, we will assume that the adjoining territory was legally and properly taken into Union School District No. 1, in St. Johns Township, Hertford County. We will further assume that the question of an issue of school house bonds in said district in the amount of \$10,000 was properly submitted to the qualified voters of the enlarged district with the result in favor of the issue of the bonds. There was for some cause a delay in the sale of the bonds, but they were properly advertised for sale at Winton on October 2d. Mr. Barnes does not state whether or not adequate bids were made upon such sale or that the sale was made at that time. It seems, however, that on that day certain citizens, residents of the adjoining territory, annexed to the district, protested the election and demanded that they be taken out of the district. The county board of education indicated some intention to comply with their request.

Of course, if bonds were sold on that date, or a contract entered into to sell them, this could not be done, for the taxes derived from their property constituted part of the consideration of the sale. If, however, bonds were not sold or contracted to be sold at that time, and the board of education assumed power to change the boundaries of the district again, there must be a new election in the district so changed in order to render the issue of bonds valid. Mr. Barnes does not state whether or not the election was held and the bonds issued and attempted to be sold under Chapter 87 of the Public Laws of the Extra Session of 1920. If they were issued and offered to be sold under that act, the county board of education had nothing to do with the issue of the bonds or the holding of the election. The former was a

corporate act of the board of school trustees of the district, and the latter the duty imposed upon the county commissioners. So, after the election is held properly and a majority of the qualified voters approve the issue of bonds, then in our opinion the county board of education cannot thereafter alter the district in such a way as to avoid the election and the approval of a majority of qualified voters in the district.

We return herewith Mr. Barnes's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CHARTERED DISTRICT—BORROWING MONEY

October 21, 1922.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—You state that it becomes necessary for the Raleigh Township school committee to borrow \$125,000.00 in anticipation of \$300,000.00 proceeds of taxes levied for the year 1922 as yet uncollected. You ask whether or not such school committee can under the circumstances, legally and constitutionally incur an indebtedness for \$125,000.00 in this way.

This office has invariably ruled that such school governing authorities may meet an emergency caused by the noncollection of current taxes by borrowing money against current funds. It is in reality anticipating assets in plain view at the time of the borrowing and not incurring a permanent debt in the sense that it is to be carried forward to another year. Limited in this way, we think the school committee can borrow this money and the notes given for the same will be valid obligations of the school district.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—ENTERTAINMENT—EXEMPTION

January 3, 1923.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have considered the letter of Mr. G. O. Mudge of Columbia, N. C., to you, and have come to the conclusion that the sheriff is right in holding that the entertainment described is taxable. Mr. Mudge states that they gave in the auditorium of the school at Columbia a series of entertainments, employing a traveling company. The school authorities furnished the auditorium, heated and lighted, and received 25 per cent of the net income after the war tax on twenty cent tickets was deducted. The company furnished all material for the entertainment and paid their own expenses. The school's part of the income is to be used exclusively for the school.

We have, however, to be guided by section 30 of the Revenue Act in determining whether this entertainment is taxable. That section declares that all exhibitions or entertainments given for the *sole* benefit of religious, charitable or educational objects shall be exempt from taxation. It is declared further in the same section that no tax shall be charged for any exhibitions or entertainments for the sole benefit of religious, charitable or educational objects and given in halls at the time exclusively used for such objects.

It is manifest, we think, from the recital of the facts in this case that these entertainments were not given for the sole benefit of the school. The part that went to the school was only 25 per cent of the net income, that is, an income derived by deducting all expenses from the gross receipts. If we were to hold that this entertainment was exempt from taxes, it would open the door to innumerable frauds upon this section of the Revenue Act. The Legislature clearly did not intend, when they used the term "sole" that such entertainment should be exempt.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BUILDING FUND—APPLICATION FOR LOAN

January 17, 1923.

DR. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*
IN RE: *Vance County Matter.*

DEAR SIR:—You desire my opinion as to whether or not the resolution adopted by the board of commissioners of the county of Vance is a compliance with the rules and regulations prescribed by the State Board of Education to enable the county of Vance to obtain its proportionate part of the school building fund created and authorized by the Legislature of 1921, and arising from the sale of \$5,000,000 of State bonds.

Second. Is it the duty of the present chairman of the board of county commissioners to certify the resolution adopted by the previous board?

(1) Mr. R. S. McCain, in your presence, submitted to me the resolution adopted by the board of county commissioners of Vance County prior to the first of December, 1922, and stated as a fact that the county commissioners had included in the tax levied for the year 1922 a tax to pay the interest on the money borrowed from the school building fund and to provide for the payment of the principal of the notes as they should mature. This resolution in my opinion complied with the rules and regulations of the State Board of Education adopted pursuant to powers conferred upon that board where the act of the Legislature authorizes the issue of the bonds.

(2) It seems to me that it is the duty of the chairman of the present board of county commissioners to certify to you as State Superintendent of Public Instruction, the resolution adopted by the board of county commissioners. The act is a mere ministerial act, and the board of county commissioners having authority to adopt the resolution and having regularly

adopted the same, it is the duty of the chairman to certify the resolution so adopted.

This disposes of the particular questions you desire my opinion about, and I will not anticipate any further trouble in this matter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTES—WHEN MANDATORY

April 6, 1923.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of April 5th.

You request the opinion of this office as to whether or not the provisions of the new public school code as contained in sections 266, et seq., are mandatory upon the county commissioners. Stated shortly, those sections direct the county commissioners to fund outstanding indebtedness incurred in obedience to the constitutional mandate requiring a term of six months for the school. The expression used is:

The board of county commissioners is authorized, empowered and directed to fund the same by—etc.

We construe this statute as first conferring the power upon the board of county commissioners to fund this indebtedness and then as directing them in positive terms to fund it. Consequently, its provisions in this regard are mandatory. This seems to be the clear meaning of the Legislature and the ruling we make is founded upon authority. Thus, Black says (p. 535), stating the rule generally:

An imperative word is not softened by its conjunction with the permissive word, but vice versa. Thus the expression "may and shall" means "must." In such a phrase "may" grants authority, and "shall" requires its exercise.

Our own Court, in *Jones v. Commissioners*, 137 N. C., 579, held as follows:

The terms "authorize and empower" used in an act conferring power upon a county, on the verge of bankruptcy, to issue bonds to fund its existing indebtedness incurred for necessary expenses and providing the only feasible method by which the financial affairs of the county can be placed on a sound basis, will be construed to be mandatory.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTES—CODIFICATION—REPEAL

April 11, 1923.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—You ask the opinion of this office upon the effect of the repealing clause contained in Section 378 of the Public School Law of North Carolina, codification of 1923, upon special or local acts enacted at the recent session of the General Assembly before the ratification of this Code.

Section 378 so far as material to this discussion, declares that "all laws and clauses of laws, including all acts passed by the General Assembly of 1923, in conflict with this act, are hereby repealed." The general rule is that laws enacted for a special purpose or for a special locality are not deemed to be repealed by a general law dealing with the same subject, but they are to be construed as exceptions to that general law. If, however, the general law specifically repeals those statutes, or, if the general law is intended to comprise in itself, the sole and complete system of legislation on the subject with which it deals, then this special or local legislation is repealed, because the intention of the Legislature apparent upon the face of the general law could not be effectuated otherwise.

The Public School Law of 1923 is professedly a codification of the public school law of North Carolina. Its title is "An act to amend the Consolidated Statutes and to codify the laws relating to public schools." The object of the Legislature is thus testified to by such title. In addition to the repealing clause hereinbefore recited it repeals specifically all of Chapter 95 of the Consolidated Statutes, including amendments since the adoption of the Consolidated Statutes, except certain specific articles in the Consolidated Statutes. It then proceeds and repeals certain specific chapters of the public laws of all sessions of the Legislature since the Consolidated Statutes, excepting certain sections which are kept alive.

It thus incorporates in this revision all the laws outstanding in the State of North Carolina which the General Assembly intended to incorporate in it, and repeals every law or part of law not incorporated therein. In doing this, the General Assembly was but obeying Section 2 of Article IX of the Constitution in providing for a general and uniform system of public schools, throughout the State. In enacting this code, it intended to comprise in it the sole and complete system of legislation on that subject. In the opinion of this office, then, all laws and clauses of laws whether public- public-local, or private enacted and ratified by the General Assembly of 1923 before the ratification of this code, are repealed so far as they conflict with it. You suggest in your letter of April 6th that there are a number of those conflicts. Wherever there are such conflicts, the charter of your authority is the new code, and as such, it is to be enforced regardless of any conflict with previously enacted private, public-local or public laws.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTE—IMPAIRING THE OBLIGATION OF CONTRACT—VESTED RIGHTS

April 11, 1923.

HON. E. C. BROOKS, *State Superintendent of Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have examined carefully the papers left with us in the matter of the Mattamuskeet Drainage District. We have before us, too, a copy of the act ratified March 3, 1923, by the recent General Assembly. That act permits the owners of land within the organized drainage district in Hyde County, if it shall be found under practical operation of the system that their tracts of land cannot be successfully drained for agricultural purposes, to file a petition for relief before the board of drainage commissioners of the district. This board is directed, upon finding that such facts exist, to alter and change the boundaries of the drainage district so as to exclude from it the tracts of land which the said drainage system does not, and cannot, successfully drain.

The Mattamuskeet Drainage District was organized in 1909 and has outstanding as liabilities of that district, certain bonds—the amount of which we do not know. We are of the opinion that lands which were included in the drainage district at the time of that issue of such bonds constitute part of the security for the payment of both the principal and interest on these bonds. If this is true, then to exclude these lands from the district would be to impair the obligation of the contract between the district and the holders of its outstanding bonds. So far as this feature of the case is concerned, then, the act of the Legislature in permitting this exclusion is invalid. If this is an attempt to relieve these lands of what is simply a maintenance tax, we do not see how this can be made effective without excluding the lands from the district for all purposes. Section 2 of the act attempts to exclude this inference. It declares:

If any tract or tracts of land shall be excluded from a drainage district under authority of section one of this act the said land or lands shall not thereafter be liable for any maintenance tax nor for any other obligation to or of the said drainage district, except for its or their proportional part of any bond issue that may have been made by the said drainage district for the original construction of the drainage system.

We are not informed as to what was the purpose of the bond issue for this district, nor the amount of bonds outstanding in the district; nor are we informed whether there are outstanding obligations of the district other than bond issues in such way as to make the act impair those obligations. Of course, if there are no such obligations or if there are bonds outstanding for any other purpose than the original construction of the drainage district, then the act would be invalid as to them. In the absence of information of this sort, we cannot advise you to participate in the proceedings instituted by other land owners included in the district, to exclude their lands from it for the purpose of maintenance tax.

There is another aspect of this matter which may render the act unconstitutional. The original proceedings under the act are judicial, and in them a final judgment has been entered which binds all the tracts of land included in the district. It has been judicially determined that each tract of land has been benefited to the amount assessed against it in the drainage proceedings. That amount has been fixed under the assumption that the tracts of land proposed to be withdrawn from the drainage district, are to contribute proportionately to the cost of construction and the cost of maintenance. To withdraw them, then, is to increase the burden of the other land owners. This, then, may be an attempt on the part of the Legislature to exercise a judicial function, and also to impair or modify the contract between the land owners in the original drainage district.

We return herewith the file of papers in relation to this matter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BUILDING CONTRACT—INTERPRETATION

April 25, 1923.

MR. N. C. NEWBOLD, *Department of Public Instruction, Raleigh, N. C.*

IN RE: *Administration Building of State Colored Normal School at Fayetteville.*

DEAR SIR:—It appears after a careful reading of the papers and an inspection of the documents in the matter, that there is a three-cornered controversy between the board of trustees of the above school, the architect in charge of the building, and the contractor for the erection of the building, arising out of the following circumstances:

Mr. Willard G. Rogers, with whom was associated Stiles S. Dixon, was the architect in charge of the work. The Brown-Harry Company were the contractors. The building to be erected was a new administration building immediately in front of an old building with which it was to be connected. The architect was to furnish complete plans, specifications and details, including preliminary sketches, and during the progress of the building was to exercise supervision over the same.

The contract entered into between the building committee of the board of trustees, the contractor and the architect was in the usual form. The floor level of the old building in front of which was to be erected the new administration building, was 143 5/10. The plans furnished the contractor by the architect made the first floor level of the new building 149. It is obvious that this plan contemplated a building with a floor level about 6 feet higher than the floor level of the old building.

The contractor commenced work upon the building, and, discovering that the plans furnished him made no provision for steps in the corridor running from the new building to the old according to his own statement, consulted with the architect and was instructed to make the floor level of the new building conform with that of the old building. This necessitated an excavation which was not provided for in the original contract, to the extent of about 6 feet.

On the 16th of February, 1922, the contractor, apprehending difficulty in making this change conform to the elevation of the building as shown on accompanying plans, stopped work, brought the matter to the attention of the superintendent of the school, and a meeting of the building committee of the board of trustees was held on April 12, 1922. At the time this meeting was held, the contractor had made the excavation and was filling the forms with cement. The minutes of this meeting show that the first matter discussed was the report made by the contractor that on account of an error in the contour survey of the site, additional excavation and concrete work would be necessary, which would entail an added cost to the contract of approximately \$5,000.

The contractors stated that early in the work a plat was furnished them by the architect; that they explained to him the additional work required, and received his o. k. to proceed. The board was unanimously of the opinion that it was the plain duty of the architect to consult the board when this complication arose and await its sanction before authorizing the additional expense. The matter was discussed at some length, but no decision reached as to where the responsibility lay. The contractor, however, was authorized by the board to proceed with the excavation at a cost of 45 cents and the concrete work at \$15.00 per cubic yard. The contractor, acting upon the authority thus conferred upon him by the board itself, proceeded then with his work and has since completed the building.

The necessary effect of this excavation was to lower the ground floor about 6 feet and to leave the rooms upon that floor under the ground level, in some instances so much so as to require artificial lights even in the day. Instead, then, of the building having its ground floor above the surface of the ground, it is practically within the ground. This was not contemplated by the board at the time the contract was entered into and has materially impaired the building for the use for which it was intended.

The architect in the first instance under the contract had no authority to grant this permission without the consent of the board. If the defect in the plans was the fault of the architect, (and it appears that such was the fact), and it resulted in this condition, it seems quite clear that the architect would be responsible for the damage accruing from his neglect in the preparation of the plans, or his willful default. Where an architect is employed to prepare plans and specifications for a building, and also to superintend the erection of the building, his relation to his employer extends no further than the performance of those services. Under this particular contract his authority was expressly limited in regard to alterations involving additional cost, by a provision that these alterations could only be made with the consent of the owner. The authority to do this must have been conferred upon him in the contract, either in express terms or by necessary implication. In the particular contract, any such implication is excluded by its wording.

There are two provisions in the contract, both found on page 2 of the specifications, which the architect contends prevents any liability on his part:

The contractors estimating on the within specified work will find that by reviewing the plat approximately how the land may lay on which the buildings are to be located, while these contours

are not guaranteed to be absolutely correct the contractor will be able to carry out by actual measurements should they vary and an accurate record will be required to be kept by him of any changes or differences that may be occasioned by a variation from what the plat shows.

This, however, refers only to minor variations that did not involve additional cost to the board. The second provision suggested by the architect is this:

In laying out the work for the various buildings the contractor will use care to have all the preliminary work done by a civil engineer, giving the actual corners of the building according to the plat furnished with the set of plans for the particular building in question and all levels for the various floors to be established by an engineer's instrument in the hands of a competent engineer with regard to the topography as shown on plat in order that there will not be any variance from the design as laid out on the landscape plats and the various approaches to the different buildings.

If the contractor failed to comply with this provision of this contract in the particulars set out therein, he, of course, would be responsible for such failure. We are informed, however, that he did have a civil engineer to perform the work imposed upon him in this provision of the contract and that in attempting to conform to the plats furnished him, he discovered the error in those plats furnished him by the architect. We will return to this feature of the case a little later.

On the same page is another provision:

All excavating of any kind for any of the buildings in question shall be carefully done with due regard for the various levels and depths of footings as shown on the different plans. Should the depth of footing be required to be deeper than what is shown, the contractor will be required to go to a depth sufficient to take care of the load super-imposed upon the same and all earth taken from the excavation and trenches to be deposited upon the site as directed by superintendent.

The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well. He is liable for the negligent disregard of his duty. In the preparation of plans and specifications, he must possess and exercise the care and skill of those ordinarily skilled in the business. If he does so, he is not liable because the plan is not a perfect one. It is only when he lacks skill or does not exercise due care in the performance of his duties, though he has skill, that he is liable. Whether or not the architect in this case lacked skill or was negligent in the performance of his duties, does not appear clearly upon the record as presented to us. It is certain, we think, that if the contractor had conformed to his plan, giving the floor of the new building an elevation of 149, that the building would have conformed more accurately to the elevation, both front and rear, as shown on the plans of the architect. The defect in the building, as we understand the problem, is its being placed

so low as to impair materially the usefulness of the lower floor. It seems that as to this, the board of trustees of the building at their meeting on April 12, 1922, not only adopted the plan which lowered the building, but authorized the contractor to proceed with the excavation and agreed with him as to the cost of such excavation. If the board had intended to complain effectively of this condition, it should have done so at that time. It should have stopped the excavation, required the contractor to fill in, and then to have imposed the superstructure upon the foundations already laid by him with the floor level higher and disconnected from the floor level of the old building so far as the level was concerned, and also required that the connection between the new and old buildings should be made by proper steps. If these steps were not in the original contract (and they seem not to have been), then the board should have provided extra compensation to the contractor for making the connection by steps.

It seems that the action of the board at that time would estop them from complaining that the building was damaged by being too low set in the ground. We are informed that the work has been done by the contractor, excluding this consideration, in a workman-like manner and in accordance with his contract. We advise, therefore, that a settlement be had with him for the remainder of the money due him, as he seems to have conformed to his contract with the modifications allowed by the board itself. We understand that the architect is not solvent; it would, therefore, be a waste of time and money to take out legal proceedings against him, particularly when it is doubtful as to his liability under the rules hereinbefore set out.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BOARD—CULLOWHEE NORMAL SCHOOL

April 26, 1923.

MR. A. T. ALLEN, *Director of Teacher Training, Office of Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of April 23d.

We have considered carefully the matters set forth in your letter and have come to the conclusion stated in the answers to your questions.

(1) When the board of trustees of the Cullowhee Normal School purchased additional real property, in whose name should the deeds be drawn? (A) It is not material to the validity of such deeds that they should be made in any particular way so that, of course, formal requisites are incorporated therein. It will, therefore, be made to the board of trustees of the Cullowhee Normal School or to the State itself. It is expressly declared in the last clause of Section 2, Chapter 61, Public Laws 1921:

The board of trustees of said school shall take and hold for the State of North Carolina all the property of every sort and kind belonging to said school placed under its supervision. But the board of trustees of the respective normal school shall not dispose of any real property without the consent of the State Board of Education.

(2) Should the deed for the stock in the Cullowhee Milling Company be in the name of the board of trustees of the Cullowhee Normal School or in the name of the State Board of Education? (A) It seems that the Cullowhee Milling Company was a corporation organized and owned by Messrs T. C. Cox, C. J. Harris and A. C. Reynolds for the purpose of furnishing light to the Cullowhee Normal School and to other parties in that community, and to do a general flour mill business. In 1921 the trustees of the Cullowhee Normal School bought the shares of Messrs. Reynolds and Harris for \$7,300.00, said sum being taken from the appropriation to that institution made by the State Board of Education under chapter 61 above referred to. The transfer of this stock was direct to the State Board of Education. This gave the Board of Education control of sixty-four shares out of a total of one hundred shares. Mr. Cox controlled thirty-six shares. Owing to the difficulty in organizing the company with the ownership as thus fixed, the State Board of Education, at a meeting held October 25, 1922, authorized the sale of one share of stock to Mr. W. W. Watt and one share to Mr. C. B. Coward. Subsequently the company was organized, with Mr. Watt as president and Mr. Coward as secretary and treasurer. This corporation has continued to furnish light to the Cullowhee Normal School. The title to the sixty-two shares of stock remaining after the transfer to the two individuals named, remained, of course, in the State Board of Education. Chapter 61 above referred to placed the control of certain normal schools, and particularly the Cullowhee Normal School, under the State Board of Education, it declaring that this board shall have the supervision and shall prescribe rules and regulations for the conduct, management, and enlargement of such normal schools. It gives the board authority to appoint members of the board of trustees of these schools. Section 3, et seq., through section 5, defines the duties and authority of the boards of trustees of these institutions. It goes into the subject so minutely that the act itself may be taken as a charter of the authority of these boards, beyond which they cannot go. The general authority then having been placed in the State Board of Education in regard to the subjects specified above, it seems clear that if the State Board of Education of its own motion should transfer this stock in the Cullowhee Milling Company to the board of trustees, it could do so legally, but after all, that is a question for the determination of the board.

(3) So long as the title to the sixty-two shares remain in the State Board of Education, it, and it alone, has authority to appoint a proxy to vote these shares.

(4) The Appropriation Act of 1923 carries a direct appropriation to the State Board of Education for teacher training schools of \$1,194,000.00. The act then goes further and directs specifically what portions of this lump sum should be assigned by the State Board of Education to the institutions named. It requires the State Board of Education to assign to the Cullowhee Normal and Industrial School \$380,000.00. All of this appropriation is to be derived from the proceeds of a bond issue and is to be devoted wholly to permanent improvements at the various institutions named therein. No part of the sum so appropriated can be diverted from this purpose to an-

other, either by the State Board of Education or by the trustees of the Cullowhee school. As to what portion of this lump sum of \$380,000.00 should be devoted to the improvement of the lighting plant of the school is a matter, in the opinion of this office, for the determination of the State Board of Education; and also as to how and when, and by what person, that part of the appropriation devoted to the milling company is to be expended.

(5) This being the case, naturally and properly, when the State Board of Education comes to consider the matter, it may determine the question of the control of the expenditure of this money for the lighting plant.

(6) You will observe that Chapter 61 declares that the State Board of Education shall have supervision of and shall prescribe rules and regulations for the control, management, and enlargement of the institution. The question, then, of whether the State Board functions through individual members of the board or through the board of trustees is one to be determined by the State Board of Education in making the rules and regulations required to be made by it in the statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ENTRIES AND GRANTS—STATUTE OF LIMITATIONS

May 22, 1923.

HON. E. C. BROOKS, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have held up the letter of Mr. Eric Norden to you in an attempt to investigate the questions propounded by him.

Of course, a State grant of swamp lands which comes within the definition of sub-section 3 of C. S., secs. 7540 and 7542, is void, but if a grant has been issued and the person to whom the grant has been made has been in possession of the land under colorable title, which the grant would be for twenty-one years, with the possession ascertained and identified under known and visible lines or boundaries, then the State and the Board of Education would be barred if they attempted to bring any suit.

Mr. Norden's description of the grants contained in his letter is so indefinite that we cannot determine whether it covers the lands taken out of the land grant act by the above quoted sections. The presumption is that they are not such lands and if these people have been in possession for a long period of time, the taxes they pay might fully compensate the State. This, however, would not be a legal bar to the suit.

We think the State Board of Education should act in these matters if it is clear that they have title to the land, even as against a state grant.

We return herewith Mr. Norden's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ANGOLA BAY—REMICK CONTRACT

May 30, 1923.

DEPARTMENT OF PUBLIC INSTRUCTION, *Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have considered the letter of Mr. Eric Norden to you dated April 28th.

These lands i.e., the Holly Shelter and Angola Bay, located in Pender and Duplin counties, have been dealt with by the Board of Education for at least ten years without having any substantial results from them. Sometime in 1913 the Holly Shelter Land Company was organized under the laws of North Carolina, and the Holly Shelter and Angola Bay property belonging to the State Board of Education was conveyed to this corporation upon the execution by it back to the State Board of Education of a mortgage to secure the purchase money. Thereafter, in 1917, this mortgage was duly foreclosed and the State Board of Education purchased at the mortgage sale and went into possession of the lands again.

It developed during the progress of the proceedings that there was a claim by what were called the Baker heirs upon the Angola Bay part of this property. This claim was compromised by the State Board of Education taking one-half of the Angola Bay property and the Baker heirs the other half, mutual conveyances having been made. So far as we have been able to ascertain, this remained the situation with reference to these two tracts of land until August, 1919, when the agreements set out in Mr. Norden's letter as an appendix thereto, were entered into between the State Board of Education and Royal C. Remick. Remick himself has never paid any part of the rent reserved in the contract between him and the State Board of Education. That contract involved a lease of the property to Remick for a period of five years for an annual rental of \$1200, payable in advance on the first day of October of each and every year, as to the Angola Bay property. The Holly Shelter property was leased to him for five years upon the payment in advance on October first of each year of the sum of \$4,000. Each of these leases was accompanied by an option to Remick to purchase the property during the term of five years upon the payment of the sum set out in the contract. Remick at no time paid the rent or conformed to the terms of the contract. It is expressly provided in the contract:

(b) That in the event of the failure of the party of the second part to pay the rent in advance on the first day of October of each year for either of said tracts described in section one or section two of this agreement, and the same shall remain unpaid for a period of sixty days, then in that event this lease shall be forfeited and the option to purchase thereunder shall terminate as to the tract of land upon which there is a failure to pay the said rent.

This lease was made after the enactment of C. S., sec. 2343, which is as follows:

Term forfeited for nonpayment of rent. In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease.

and consequently, must be interpreted in the light of this section.

This being true, all the rights of Remick under the contract of August 11, 1919, have been forfeited by his nonpayment of the rent, his option likewise being forfeited, as it is expressly declared that the right to exercise the option was dependent upon his payment of the rent up to the time the option was attempted to be exercised. Mr. Remick himself recognized this forfeiture on October 21, 1921, when having organized another North Carolina corporation called the Herdlea Farms Company, he made another arrangement with the State Board of Education by which that corporation was to take over all this property, pay a certain sum in cash for part of it, and execute a mortgage to secure the purchase money for the rest of the property. The latter agreement between Remick and the State Board of Education fell through on account of his failure to raise the cash payment necessary to make it effective. Consequently, in the opinion of this office, Mr. Remick has no interest in, or to, any of this property.

As to the oil lease, by its express terms as contained in said lease, it expired on January 1, 1922.

We return herewith the papers of Mr. Eric Norden.

Very truly yours,

JAMES S. MANNING,
Attorney-General

SCHOOL DISTRICT—IN TWO COUNTIES

June 26, 1923.

MR. W. H. PITTMAN, *Department of Education, Raleigh, N. C.*

IN RE: *Battleboro School District.*

DEAR SIR:—This school district lies partly in Edgecombe County and partly in Nash, about half in each county. The district was organized in 1907 under Revisal, sec. 4129 (now C. S., sec. 5471) by agreement of the two boards of education. At that time the boundaries of the school district were defined and reports made to the boards of education of the two counties. The boundaries of the Edgecombe side of the district were duly recorded upon the minutes the board of education. Unfortunately, this was not done in Nash County. As a consequence, the boundaries in that county are not clearly defined.

At the time of the organization of this district the question of levying a special tax for the support of the school in the district was submitted to the voters in the whole district, and the special tax was adopted by a large

majority of the qualified voters in the whole district. This tax has since 1907 been levied by the commissioners of Nash County upon the Nash part of the district and by the commissioners of Edgecombe County upon the Edgecombe part of the district. The proceeds of the tax in Nash County were paid over to the treasurer of Edgecombe County because the school house of the district was located in that county, all this being strictly in accordance with the provisions of the statute quoted above.

Through inadvertence or neglect, the records of this election adopting the special tax in the district were not recorded in Nash County, there being another school district in these two counties organized about the same time—the Whitakers School District—in which conditions were similar except that the school house there was located on the Nash side.

By agreement between the two boards, the board of education of Edgecombe County administered the funds in the Battleboro District for the benefit of the district, while the board of education of Nash County administered the funds of the Whitaker District for the benefit of the Whitaker District. This condition continued until some time in 1919, and an election was held in the Battleboro District to determine the question of an issue of \$25,000 in bonds. This election was held throughout the district, voters in Nash County as well as in Edgecombe voting for the issue by majorities of the qualified voters. At the time the bonds were voted, a special tax to care for them was also voted.

It seems that when this election was held, it was discovered that proper records were missing in the office of the Nash County Board of Education. You ask this office to instruct you as to what should be done under this situation. We think that a recital of these facts in full, entered upon the minutes of the Board of Education of Nash County, with an order which defines the limits of the Battleboro District in Nash County in accordance with the original limits as established in 1907, would cure the omissions, the general rule being that previous inadvertence or neglect of a governmental body which affects the interests of others may be cured by making a record now of what should have been recorded at an earlier period. The long acquiescence of the voters within the limits of this district to the special tax voted in 1907 would in itself furnish grounds for making these entries nunc pro tunc.

If the district wishes to incorporate formally and thus secure the benefit of incorporation, it may do so under section 233 of the new school code.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SPECIAL TAX DISTRICT—AUTHORITY OF COUNTY BOARD

June 28, 1923.

MR. W. H. PITTMAN, *Secretary, Department Education, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. John W. Carr, Jr., to Superintendent A. T. Allen, in regard to the two school districts in Durham County.

It appears from this letter that the Union and New Hope schools in Durham County last year had two teachers. This year, however, they have not had an average attendance of thirty scholars and as a consequence, the board in pursuance of the statute, section 37 of the school code, has allowed them only one teacher each. These districts, however, are special tax districts and thus collect a fund in them to supplement the general fund allowed them by the county board of education. It is obvious that this special fund is to be used primarily to lengthen the term of the schools in these districts beyond the six months' term required of the county by the Constitution. It is apparent, however, from the general tenor of the statute that public school education in the county, as a general system, is under the control of the county board of education. It is expressly declared in section 144 that the school committeemen of these local tax districts are subject to the same rules and regulations of the county board of education as those governing the acts of the committeemen in nonlocal tax districts. See also section 58 and section 150. The proviso to section 57 permits the county board of education upon the recommendation of the committee of the local tax district to authorize the committee and the superintendent to supplement the salaries of all teachers of the district from funds derived from local taxes, and the minutes of the board shall show what increase is allowed each teacher in each local tax district.

Thus, it is apparent that the committees of these local tax districts are under the control of the county board of education in all particulars concerning the expenditure even of the special taxes raised in that district. We think, therefore, that the county board of education in dealing with these special tax funds may in their discretion authorize the committees of these two districts, if they have special funds sufficient, to hire an additional teacher, though the limit of attendance does not reach thirty. It necessarily follows from this position that without this authority from the county board of education the school committee itself cannot employ more than one teacher in these districts. We think this is fair interpretation of the statute, and as the county is made the unit for the administration of the school funds, it is the only interpretation that will carry out the purpose of the act, to coördinate school control throughout the county.

We return herewith Mr. Carr's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY BOARD—BORROWING MONEY

July 2, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of July 2d.

You state therein: The county board of education owes to the city schools of Burlington and Graham a balance due July 1, 1922, on account of uncollected taxes and another balance due on July 1, 1923, also uncollected taxes. The boards regarded these uncollected taxes as an asset and the amounts

were not included in the amount of outstanding indebtedness funded under section 266 of the new school code. The city schools demand that the county board of education borrow an amount of money at this time sufficient to pay these deficits, together with interest from the dates they were due. Before answering your question as put, we will eliminate the question of interest entirely from the problem.

It is very clear that the said boards will not be entitled to any interest upon uncollected taxes, though they should long since have been collected. The first question put by you is, can the county board be required under such circumstances to borrow the money and settle these amounts at this time? (Answer): In the first place, it is quite clear that these amounts should have been included in the funding proceedings adopted by the Board of county commissioners under section 266. The reason given for not having included these amounts in that scheme is that they represented variable assets at the time. This, of course, assumes that all these taxes are collectible. While section 56 of the new school code requires the county board of education to borrow money if the taxes for the current year are not collected when the salaries and other necessary operating expenses become due, we regard such authority as referring strictly to the county schools and not to the schools of special charter districts. Section 194 of the school code contemplates that the taxes should have been collected before the proportion belonging to the special charter districts should be allotted to them. In this matter it is admitted that the taxes have not been collected. The county treasurer's authority to place the proportionate part of the county school fund which belongs to the county board of education and the proportionate part to each special charter district is plainly based upon the receipt by him of the moneys collected by the sheriff (section 194). The special charter district, then, has no right to call upon the county board of education to borrow for them money against uncollected taxes, nor would it have any cause of action against the county board of education to compel it to assign to it its proportionate part of the proceeds of the county tax until it, the county board, refused to do so after the taxes had been collected.

This answers both questions in the negative.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FARM DEMONSTRATION WORK

July 12, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of July 10th.

The statute, sub-section 40, of C. S., sec. 1298, confers authority upon the board of county commissioners to coöperate with the State and National Departments of Agriculture to promote farmers' coöperative demonstration work and to appropriate such sum as they may agree upon for this purpose.

We find nowhere any authority permitting the county board of education to participate in the cost of farm or home demonstration agents.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY BOARD—ASSUMPTION OF DEBT

July 12, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

IN THE MATTER OF *the Kinston Special Charter District.*

DEAR SIR:—Mr. Sams, Superintendent of the Lenoir County public schools, puts this question to your office which you refer to us for reply: "Has the county board of education under the school code of 1923 authority to assume the indebtedness of a special charter district which has surrendered its charter under the provisions of section 157 of such code?" The question is asked particularly with reference to the Kinston school district which has a bonded indebtedness of something like \$370,000. We think that in order that a special charter district may surrender its charter and become a local tax district under section 157, it must must comply substantially, at least, with the provisions of that section. Where they are complied with, stated broadly, the only effect of compliance is to substitute for the existing governing authorities of the district the county board of education. In other words, as to this, the charter is repealed and the district becomes a local tax district subject to the control of the county board. Where there is outstanding indebtedness, the statute declares:

Nor shall the provisions of this section affect the validity of the bonded indebtedness of any special charter or incorporated district. The same shall be and remain a charge upon all the taxable property of said district in as full and ample manner as it was before the repeal of the charter.

This in the opinion of this office is as far as the Legislature could go in dealing with the bonded indebtedness of the special charter district, without impairing the obligation of the contract between the district and the bond purchasers and owners. So, therefore, though the charter is repealed, the bonded indebtedness is to be taken care of by the special tax authorized heretofore to be levied upon the property of the district, said tax, however, to be levied in the same manner as are special taxes in local tax districts. We, therefore, answer the above stated question in the negative.

Article 18 of the Code, secs. 234, et seq., classifies territorial divisions of the county which are declared to be special school taxing districts in which special school taxes may be voted as provided in another section. The fifth class stated in the statute is the entire county, excluding one or more townships or one or more special charter districts. For some reason the statute does not contemplate making the whole county without exception, a special school tax district. If conditions are such in Lenoir County that this statute could be complied with there without excluding the Kinston

charter district, then in section 238 the county board of education is given authority to assume all indebtedness, bonded and otherwise, of the special charter district and pay all or part of the interest in installments out of the revenue derived from the rate voted in the special school taxing district. This, however, is in the nature of a refunding of outstanding bonds and that could not under the Constitution be done without the consent of the bond holders.

We return herewith Mr. Sams's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY COMMISSIONERS—AUTHORITY TO BORROW

July 18, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In addition to the letter of Mr. R. W. Allen to you, from Wadesboro, N. C., dated July 12th, we have also a letter from Mr. A. F. Mitchell of Brevard, N. C., of same date. Both of these letters involve a determination of the authority of county commissioners to borrow money to provide adequate buildings for the common schools in the county. Both of these letters seem to disregard Chapter 147, of the Public Laws of 1921, which act provides a loan fund for the State to loan to counties to assist them in providing adequate buildings for schools. We suppose that both Anson County and Transylvania County upon a proper showing can borrow from this State fund. If this is true, they ought first to apply for a loan from that fund before resorting to other methods to raise money to provide adequate school buildings. Section 59 of the new school code declares:

School buildings properly lighted and equipped with suitable desks for children and tables and chairs for teachers are necessary in the maintenance of a six months' school term. It shall be the duty of the county board of education to present these needs each year to the county commissioners, together with the cost, and the county commissioners shall be given a reasonable time to provide the funds which they upon investigation shall find to be necessary for the proper equipment with buildings suitably equipped, and it shall be the duty of the county commissioners to provide the funds for the same.

Let us assume, therefore, that after the particular county has borrowed from the State all that it can obtain under the act of 1921, and there still remains a deficiency in the amount necessary to provide adequate school buildings, what authority under such conditions has the county board of commissioners to borrow money to supplement these funds.

We think that section 189 of the school law will not aid at all to solve the question where the amount to be borrowed is so large that it cannot be met by an increased tax rate for the next ensuing year. That section

plainly contemplates only the latter situation. Mr. Mitchell's question is put in this form:

Have the county commissioners authority to borrow money to erect and equip school buildings in an amount, say, of \$100,000, and repay the same in serial notes of \$2,000 per year each year for the next ten, and then \$4,000 per year thereafter till paid?

He states further that many places are without school houses and equipment. Assuming the conditions above set out to exist in Transylvania County, we see no constitutional reason why the board of commissioners are not required by the Constitution to use every means available to them to provide school houses and equipment where necessary to run the schools for the constitutional term of six months. Of course, under no condition could the county commissioners borrow money for the erection of school houses other than that stated above. Whether or not this rule is applicable to Transylvania County, we do not know, and our ruling is based solely upon the assumption that Transylvania County presents a peculiar condition such as that set out hereinbefore.

We understand that Section 6 of Chapter 3, Public Laws, Extra Session of 1920, is still in force. That provision is as follows:

No county in this State shall incur bonded indebtedness in an amount exceeding five per cent of the assessed valuation of the taxable property in the county as ascertained by the last assessment previous to the incurring of any new bonded indebtedness.

We do not interpret this statutory provision, however, as limiting the authority of the county commissioners to borrow money where such borrowing is absolutely essential to the conduct of the schools of the county for the constitutional term of six months, nor do we interpret this provision as at all affecting the authority of the county to borrow from the State under the act of 1921, nor the authority of the State to lend to the county. Nor do we think that a local act prohibiting the incurring of any indebtedness by the board of commissioners without submitting the question of the indebtedness to the approval of a majority of the qualified voters in the county affects the authority of the board of county commissioners to borrow money when conditions render such borrowing essential to the running of the schools for the constitutional term of six months.

The Anson County condition is somewhat similar to the Transylvania situation, but it is not entirely the same. Mr. Allen's letter there. Like Mr. Mitchell's, seems to disregard the authority of the county to borrow from the State fund. It is very clear that the board of commissioners of that county can borrow from the State fund and lend to a special tax district for the completion of a school building in that district, the State taking the obligation of the county for the repayment of the money and the county taking the obligation of the district for the repayment of the money to it, this under the above act of 1921.

The special act prohibiting the commissioners of Anson County from borrowing money for any purpose in an amount of more than \$5,000 except upon the approval of a majority of the qualified voters in the county would not, and could not, affect the authority of the county to borrow from the State fund and the authority of the State to lend the money to the county under the act of 1921. If, however, the purpose is to borrow money to aid a district in erecting a school house larger and more expensive than is necessary to run the school for six months, we think the board of commissioners would not have the authority to go into the money markets and borrow this money, giving its bonds or notes for the same, particularly in the face of a special statute, such as that referred to above.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CONSOLIDATION—SPECIAL TAX

July 18, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. Geo. E. Long, Superintendent of Public Instruction of Catawba County. Mr. Long in his letter to you of July 13th states that they are attempting to form a special school taxing district out of three districts. In one of the districts there is existing at the time of the consolidation a special tax of 30 cents and in the other districts a tax of 15 cents. He proposes after the organization of this special taxing district under sections 234, et seq., of the new school code, to submit to the voters of the taxing district the question of levying a tax of 30 cents upon the property of the district thus established. In the light of the decisions of the Supreme Court in the Perry, the Hicks, and the Davidson County cases, he wishes to know whether or not this can be done.

The question is exceedingly difficult to solve. Indeed, it cannot be solved satisfactorily without a submission of the question to the Supreme Court of the State to be determined by them in the light of the provisions of the new code. If we apply the principles of the above cases decided upon the old statute—Chapter 179 of the Public Laws of 1921, this could not be done. Indeed, the new code, in section 77, declares that the consolidation of districts having before local tax rates would authorize the levy in the consolidated district of only the lowest tax rate voted in any of the districts. If this is to be construed in connection with sections 234, et seq., then the consolidation of the three districts in Catawba would result in the permission to levy a tax of only 15 cents on the \$100. If, however, these latter sections, 234 et seq., are intended to meet the situation arising out of the previous cases in the Supreme Court, by creating a special taxing district as was done in the Guilford County act, which was sustained by the Supreme Court, then the question of a special tax of 30 cents could be submitted to the qualified voters within the territorial limits of the new taxing district without any conflict with Section 7 of Article 7 of the

Constitution. If Mr. Long chooses to do so, then, he can present the question squarely to the court in his new consolidation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY SUPERINTENDENT—ELECTION

July 31, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*
ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—In reply to yours of July 27th.

We have considered the letter of Mr. Harrison Baird, which was enclosed in yours, and which we herewith return. It seems that Mr. Frank A. Edmundson, Superintendent of Public Instruction of Avery County, was elected to such office last April and recently has tendered his resignation to the board, to take effect on the first Monday in September, which resignation has been accepted by the board. Upon the acceptance of the resignation of Mr. Edmundson, the board of education elected Mr. B. D. Franklin as his successor.

In the election of Mr. Franklin the board did not comply with the provisions of section 43 of the new school code. That section requires the county board of education to elect a county superintendent of public instruction for a term of two years as soon as convenient on or after the first Monday in April. The board is required to fix a time for the election of county superintendent, and is further required to give public notice of the same in a paper published or circulated in the county, and to post a notice of the same at the courthouse door at least fifteen days before the date fixed for the election of said superintendent. The term of the superintendent so elected is to begin the first Monday in July.

We think this statute is intended to apply only to the original election, for the time of such election is made by the statute uncertain so that it occurs on or after the first Monday in April. This, of course, is to prevent the taking of a snap judgment by the board of education and their election of so important an officer without any notice to the people. Where, however, a vacancy occurs, it may often be sudden and unforeseen. To require this notice of an election to fill a vacancy would leave the important office of county superintendent of public instruction vacant during the period necessary to give the proper notice.

Section 88 of the new code seems to recognize the necessity for filling vacancies at once, for it does not require any notice of the election to fill the vacancy to be given. It simply declares: In case a vacancy by death, resignation or otherwise in the office of the county superintendent, such vacancy shall be filled by the county board of education." In consequence of this view, we think the election of Mr. Franklin by the county board of education of Avery County under the circumstances detailed above and without the notice required at the original election of the county superin-

tendent, was valid. It may be that if we pass over another feature of this election, however, without notice, that we should be understood to approve the election of Mr. Franklin without any notice under the circumstances of this case. Mr. Edmundson's resignation was not to be effective until September 1st. It was, therefore, a tactical mistake on the part of the board of education of Avery County to elect his successor without notice. It gives room for criticism, and permits the disaffected to charge them with "star chamber" methods.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REFUNDING DEBTS

September 27, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—Your letter of September 25th has been delayed in reply because the writer under the stress of work was wholly unable to reach it.

The first question propounded in it was, whether or not the county board of commissioners would be required to fund debts incurred after January 1, 1923, in operating the six months' school term for the school year 1922-23, under section 266 et seq., of the new school code. It seems quite clear that these provisions apply only to the "outstanding indebtedness created for the necessary expense of conducting the six months' school term in the county as provided by law for the year or years previous to the year 1923." Section 267.

The second question is, taking into consideration the meaning of the whole school code, is the board of county commissioners required either to fund or to place on the budget all indebtedness incurred in operating legally the six months' school term prior to June 30, 1923? We think that the following sections of the new code answers this question: Sub-section C of section 175; section 179; the latter clause of section 183, and sections 184 and 185. Stated broadly, the new code seems to contemplate that all indebtedness legally and constitutionally incurred not funded under sections 266 et seq., is to be provided for in the budget presented by the school boards to the board of county commissioners. Section 185 is mandatory upon the commissioners to levy a property tax to meet the outstanding indebtedness not funded under section 266.

We return herewith Mr. Carr's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SOLICITORS—FINES—COMMISSIONS

October 29, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have considered the letter of Mr. N. F. Steppe, Marion, N. C., which we return herewith, and are clearly of the opinion that solici-

tors under sub-section (g) of Section 1 of Chapter 97, Public Laws, Extra Session 1920, are not entitled to commissions on fines imposed by courts upon convicted defendants. Section 5 of Article 9 of the Constitution of the State seems to make a distinction between penalties, forfeitures, and fines. It devotes the clear proceeds of all penalties and forfeitures (but does not stop there but goes on) and of all fines to the school fund. A fine is the sentence pronounced by the court after the conviction of the violation of the criminal laws of the State. A penalty is an amount to be recovered, fixed by some statute. A forfeiture in the connection in which it is used in the particular statute is the sum to be recovered upon a recognition which has been forfeited. The solicitors are paid in full for the prosecution of criminal cases by other provisions of the statute, and are, therefore, not entitled to any commissions upon the fines so collected. It is otherwise in relation to penalties and forfeitures because their collection involves—if not other, certainly collateral proceedings independent of the criminal prosecution.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MEDICAL INSPECTION OF CHILDREN

November 7, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—The question presented in Mr. Haworth's letter to you under date of October 30th is one which will never be determined definitely, it is probable, until submitted to the courts for decision. The question seems to be this: Have the school authorities of a special charter district power to employ a physician to work with the school nurse in the medical inspection and physical examination of all pupils? There can be no question that the Legislature of North Carolina would have constitutional power to permit the use of school funds for this purpose, if for no other reason, because the inspection of the children by competent physicians might prevent the communication of disease by contact or otherwise. I have looked pretty thoroughly through the statutes and find no specific authority from the Legislature to adopt this plan. Indeed, where the Legislature has spoken, sections 5747 et seq., of the Consolidated Statutes, it has adopted another plan for the examination of pupils in the public schools of the State. It is true that section 39 of the school code requires a special course of instruction in the elementary schools in health matters. This would extend so far probably as to have and pay for lectures on health matters when the governing authorities of the school thought it wise to have such lectures, but I do not think that it confers any authority upon the boards to have a medical inspection of their own.

I have read with a great deal of interest Mr. Coulter's opinion to Mr. Haworth, and agree with his conclusion therein. The Minnesota case which he cites expressly holds that in Minnesota school boards may employ a

suitable person to ascertain the physical condition of the pupils in attendance upon the public schools of the district, and defends its conclusion in this way:

Education of a child means much more than merely communicating to it the contents of textbooks. But, even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study each child is capable of. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. And this is peculiarly true of children whose immaturity renders their mental efforts largely dependent upon physical conditions. It seems that the school authorities and teachers coming directly in contact with the children should have an accurate knowledge of each child's physical condition, for the benefit of the individual child, for the protection of the other children with reference to communicable diseases and conditions, and to permit an intelligent grading of the pupils.

We suggest therefore, that a case be constituted and submitted to the courts, so that the authority of the board of education may be tested in the particular mentioned.

I return Mr. Haworth's letter herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL BUILDING—FIRE

November 13, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. L. J. Bell to you, and find great difficulty in suggesting the proper solution of his problem. He states that the three room colored brick school building situated near Hamlet, N. C., was burned. It is impossible for them to erect another building in time to run the school this year. He states further that there is no suitable building that can be used temporarily in which to teach the school with any degree of efficiency or satisfaction. He desires to know whether or not under the law, instead of running the school this year, they can give the money applicable to the teachers' salaries for this year and apply it later to the construction of a better school building.

If it is impossible to erect a building in time to run the school for this year (and this is entirely probable), it must be likewise be wholly impossible to secure a suitable building to be used temporarily. Recognizing the force of these words, the law does not compel anyone or body to do an impossible thing.

The trouble about the situation, however, is that the teachers' salaries are provided for annually in the May budget. We know no way by which these general school funds applicable to a particular school under the jurisdiction

of the county board of education, can be assigned to a particular district for teachers' salaries and then held up and diverted to another purpose. That is a legal difficulty, however, which possibly may be avoided by the administration of the law.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE DEPARTMENT OF EDUCATION—PRINTING

November 13, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*
ATTENTION OF MR. W. H. PITTMAN.

DEAR SIR:—We have considered carefully your letter of November 8th, and are sorry we cannot modify the oral opinion which we gave to you upon the effect of Chapter 234 of the Public Laws of 1923. You will observe that in section 2 thereof it is expressly declared that the \$5,744.00 are appropriated for the purpose of paying the indebtedness incurred and providing for other necessary printing for the remainder of the biennial period ending June 30, 1923. We are sorry that we cannot read into this act any intention to make Chapter 229 of the Public Laws of 1921 applicable in such way as to allow you the seven months' pro rata part of your existing appropriation in addition to the \$5,744.00.

Your third question seems to be answered by the letter of the Attorney-General dated March 14, 1922.

We think Chapter 234 of the Public Laws of 1923 contemplates the combining of the printing of the State Superintendent and the State Board of Education in such way that the entire amount is to be paid out of the \$35,000.00 appropriated for 1923.

We think the State Superintendent cannot anticipate an appropriation for future biennial period in such way as to draw money from the State Treasury in advancing the time in which it is appropriated. No doubt he can make a contract for printing in one biennial period, with the cost thereof to be paid in a subsequent biennial period, if this does not take money from the treasury before it is authorized by the General Assembly.

We return herewith the documents accompanying your letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

PUBLIC SCHOOLS—CHILDREN IN ORPHANAGES

December 13, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Messrs. Phillips & Bower to you in relation to children in orphanages attending public schools. Section

373 of the new school code—Chapter 136, Public Laws, 1923—declares (among others) Article 27 of Chapter 95 of the Consolidated Statutes to be of full force and effect. There can, therefore, be no intention that said article has been in any degree modified by more recent legislation. C. S., sec. 5604, is as follows:

5604. Children in orphanages permitted to attend public schools; expenses. Children living in and cared for and supported by any institution established or incorporated for the purpose of rearing and caring for orphanage children shall be considered legal residents of said district in which the institution is located, and a part or all of said orphan children shall be permitted to attend the public school or schools of said district, and the extra expense of teaching said children for six months in the public school or schools of said district shall be borne as follows:

Three-fourths of the extra expense for a term of six months of every year, as a result of the attendance of said children, shall be paid out of the State public school fund and one-fourth out of the county fund, unless otherwise provided.

Manifestly, this section is mandatory upon the State in relation to three-fourths of the extra expense for a term of six months every year as the result of the attendance of orphan children. The expression used in the statute in speaking of the source from which the State expense is to be borne, is "shall be paid out of the State public school fund."

At the time of the enactment of this section of the Consolidated Statutes, March 11, 1919, (see Chapter 301, Public Laws, 1919), there was levied a property tax which was collected by the State for the benefit of public schools. Since that time, however the State has refused to levy such property tax and it now has three funds which it devotes to aiding the counties in properly conducting the public schools in the counties: (1) The State equalizing fund; (2) The State building fund, and (3) a fund which is called in Section 4 of Article 9 of the Constitution, a State fund for purposes of education. The acts which provide for the equalizing fund, Chapter 141, Public Laws 1923, and Chapter 163, Public Laws 1923, specifically appropriate all of this fund to particular purposes, and when so applied, the appropriation would be exhausted leaving nothing to meet the expense voluntarily assumed by the State in the education of orphans in orphanages. All through the statutes this fund is called the State equalizing fund. The special building fund is provided for by bond issues and the proceeds of these bonds are devoted to a specific purpose, i.e., as aids to the counties in erecting proper school houses for children of the State. It is called in the statutes the special building fund and is devoted only to that purpose.

There remains, therefore, only the fund which is provided for in Section 4 of Article 9 of the Constitution. We think, therefore, that if conditions should arise hereafter under which Article 27 of Chapter 95 of Consolidated Statutes should be invoked in behalf of children at orphanages, the State

would have to resort to this third fund for the means to meet the obligation voluntarily assumed by it in said article.

We return herewith the letter of Messrs. Phillips & Bower.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL BUILDING FUND—PAYMENTS

December 19, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

MY DEAR MR. ALLEN:—Your letter of the 18th inst., received informing me that an installment of the principal, amounting to \$250,000.00, is now being paid by the county boards of education, and this constitutes a part of the \$5,000,000.00 school building fund which the State is loaning to the several counties for school buildings, and you ask me if the State Board of Education has any authority or power to reloan this \$250,000.00 or any part of the same, and I regret to have to advise you that in my opinion, these repayments by the county boards of education constitute the sinking fund provided by law for the redemption of the State bonds, and the Legislature has made no provision for the reloaning of this fund or any part of it, and in my judgment the State Board of Education is without authority to loan any part of it. The act authorizing the issue of bonds and the loaning of the proceeds of the sale of the bonds to the several county boards of education directs that the Treasurer of the State shall invest this sinking fund either in the purchase of bonds or by deposit in banks, or possibly under the sinking fund act, in securities named in said act.

I regret that there should have been any misapprehension as to this matter and that some of the counties will be disappointed in not receiving necessary aid in carrying out their school building programs, but this is unavoidable as the law is now written.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGH SCHOOL FUNDS

January 2, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered Mr. Carr's letter of December 28th. He presents for your consideration two plans, and inquires of you whether or not those plans are legal.

(1) He proposes to furnish negroes with high school instruction through the Durham State Normal School, instead of conducting separate high schools in each of the various districts. He proposes to ask the local tax districts to pay from local tax funds the cost of this high school instruction in the

State Normal School when it extends beyond the constitutional six months' term. He desires to know whether this plan will conflict with section 150 of the new school code. That section declares:

It shall be illegal for the county superintendent of the county board of education to use any of the local tax funds for any purpose except for the support, maintenance and permanent improvement of the school within the district in which the tax is collected.

It seems that his object is to relieve primary and grammar schools of the high school feature and leave the teachers free to devote their whole time and attention to the primary and grammar school students. Where not expressly forbidden by statute, the county board of education has very large discretion in determining the method of conducting the public schools in their respective counties. See section 31 of the act. If this in the opinion of the county board of education is the most economical method of providing high school education for these negro children, we think that it would not be illegal, though the question is not free from doubt.

(8) He suggests also a difficulty arising out of Section 150 in the transfer of suburban high school children to the city schools. It is proposed that some of the children of the county districts be allowed to attend the city high school, and that the district committees appropriate to the city schools from the local tax the actual per capita cost of the term in excess of the constitutional six months' term. The observations under the first questions would likewise apply to this.

We return herewith Mr. Carr's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL FUNDS—INTEREST

January 2, 1923.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. Frank H. Kennedy to you. He inquires whether or not the county board of education should pay a part of the interest on money that the city school board is compelled to borrow to pay teachers, etc., because taxes have not been collected in time to meet these payments.

The Charlotte school board is the governing authority of a special charter district. We know no law which would compel the county board of education to pay any part of the interest on money borrowed by this board in anticipation of taxes uncollected.

We return herewith Mr. Frank H. Kennedy's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

NONRESIDENT—TUITION

January 17, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. J. H. Allen, County Superintendent of Rockingham County, and are clearly of the opinion that Mr. Smothers is not entitled to the credit of \$18.25 upon the tuition of his children in the Reidsville city schools, as he does not pay taxes on any property in the Reidsville school district. It is only where the taxpayer owns land in a special tax district in which he claims a credit for tuition, but he himself resides out of the school district in which he sends his children, that he is entitled to this credit.

Mr. Allen's second question seems to be largely a matter of agreement between the governing authorities of the Monroe special tax district and those of the Reidsville school district.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SOLICITORS—COMMISSIONS ON FORFEITURES

January 17, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—Mr. Walter C. Feimster, in his letter to you of January 10th, is clearly right in his opinion that solicitors are entitled under sub-section (g) of Section 1 of Chapter 97, Public Laws, Extra Session of 1920, to 10 per cent upon all collections of penalties and forfeited recognizances. Some time ago we think we rendered an opinion to your office that under this statute solicitors were not entitled to 10 per cent upon fines imposed and collected in criminal actions. A fine in this sense is a very different thing from a penalty or forfeited recognizance. The statute does not give the solicitors 10 per cent upon the collection of fines.

We return herewith Mr. Feimster's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITY—EXTENSION OF CORPORATE LIMITS

January 17, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. R. H. Latham, Superintendent of Schools of the city of Winston-Salem. Therein he presents a question of very great importance which required minute investigation of all the statutes extending the limits of the city of Winston-Salem since 1909. After such investigation, made in the midst of the many duties of this office, we have come to the following conclusion upon the questions asked by him:

There have been quite a number of extensions of the city limits of Winston-Salem. The particular extension with which Mr. Latham is dealing was one under Chapter 95 of the Private Laws of 1923. In all the acts that we have found permitting this extension, there was incorporated in the particular statute, as there is in the act of 1923, the following provision:

And thereupon said territory shall be a part of said city and subject to the government thereof as fully and to the same extent as the original territory included in the boundaries of said city.

It appears that the act of 1923 has been fully complied with and that the additional territory legally annexed to the city of Winston-Salem. In this territory were three schools theretofore operating under the county board of education. In Chapter 72, Private Laws of 1909, section 50, there is a provision placing public schools within the limits of the city of Winston under the control and management of a school commission, to be elected by the governing board of the city. Upon this commission is imposed all the duties and conferred all the powers and privileges which, in relation to county schools, are imposed upon the county board of education. The effect, then, of the annexation of outlying territory to the city of Winston-Salem, which territory had theretofore contained schools under the control of the county board of education, would be to transfer those schools bodily to the control of the school commission of the city of Winston-Salem. The latter body's authority in relation to the employment of teachers, fixing their salaries, length of the term of school, etc., is plenary under the above referred to Section 50 of Chapter 72, Private Laws of 1909.

Taking up, then, Mr. Latham's questions seriatim,

(1) We think the city board cannot now since the annexation, charge children residing in the annexed territory tuition for their schooling in the city schools.

(2) We think the transfer of children from the Waightown high school to the R. J. Reynolds high school is subject to the control of the school commission of the city of Winston-Salem.

(3) The obligation of the county to maintain the three schools in the territory annexed to the city of Winston-Salem ceased upon the annexation, except, of course, as to the general county aid to city schools for the six months' term. We think also that the payment of the salaries of the teachers in these schools is a duty imposed upon the city school commission.

(4) If there is a statutory obligation upon the school commission to maintain all the schools in the city limits for a term of nine months, this term would apply likewise to the schools in the territory so annexed. If it is a rule and regulation of the school commission only, then it would be a matter of discretion for them.

(5) The bonded indebtedness upon the Waighton special tax district cannot be affected by the annexation so far as the obligation of the contract with the bondholders is concerned. If the city will not undertake to pay this indebtedness from its taxes at large, the bondholders would be entitled

to require a special tax still to be levied in that particular district to meet the interest and principal of such bonds.

(6) We think the affect of the annexation of this outlying district with its three schools will vest the title of the school property in this district in the school commission of the city of Winston-Salem or in the city of Winston-Salem itself, as the statute may provide. There is no obligation upon the city under circumstances of this sort to purchase the school buildings from the county board of education.

The above is the result of our investigation of the questions involved. We suggest, however, that it is a matter which ought to be taken up with the city attorney and the attorney for the county board of education for their determination and advice.

We return herewith Mr. Latham's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE LITERARY FUND—LOANS

January 19, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of January 17th.

We think the State Board of Education is required by the act. section 274 of the new school code, to make loans to county boards of education from the State literary fund without the signature of the board of commissioners. If you will compare section 274 with sub-section (b) of section 278 of the new school code, you will find that the terms of loans from the State literary fund are different from those provided in said sub-section (b). Section 274 requires only that the loans shall be evidenced by the note of the county board of education, while sub-section (b) expressly requires the approval of the county commissioners and also a certificate from them that the loan is necessary to maintain a six months' school term, when that loan is made from the special school fund. These differences between the two statutes are the foundation for this ruling.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REFUNDING BONDS—INTEREST

January 19, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—Sometime ago we rendered your office an opinion that the indebtedness incurred in complying with section 266, which requires the county commissioners to fund outstanding indebtedness incurred in operating the schools for six months, placed the issue of the bonds, the levy of the tax, and the payment of the principal and interest of the bonds in the hands of the board of county commissioners as an administrative body. This makes the board of county commissioners responsible for the payment

of the interest and principal of these bonds. We think, therefore, that the commissioners themselves pay these sums without the intervention of the board of education. We do not interpret sub-section (c) of section 175 or section 179 as requiring this particular indebtedness and the interest and installments due thereupon for the year to be set out in the budget made by the county board of education. The terms are broad enough to include it, but the sections which deal with these refunding bonds cover the ground so fully and make it so clearly a duty of the county commissioners, that we think it is not necessary to include these amounts in the budgets presented to the county commissioners by the board of education.

We return herewith Mr. J. M. Glenn's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CONSOLIDATION—SPECIAL CHARTER DISTRICTS

February 22, 1924.

MR. N. C. NEWBOLD, *Director, Raleigh, N. C.*

DEAR SIR:—Mr. Pelton's letter to you does suggest a real difficulty. In addition to this, in a decision in a Gates County case handed down this week, the Court expresses a doubt whether in applying the consolidation of section 73 and 73-a, a special school taxing district can be formed of a local tax district and a special charter tax. That question was, however, not presented in the case, and the statute apparently intended otherwise. There is one way by which all difficulty in the consolidation of the Southern Pines and West Southern Pines districts might be obviated, (laying one side for the matter the doubt of the Court above mentioned) and that is, to make these two districts a special school taxing district in accordance with the provisions of section 73a et seq., and then submit to the new territorial unit, the consolidated district—the question of a special tax of 50c on the \$100.

Still another way is to permit the Southern Pines District to become a local tax district under section 157, and then consolidate and submit the question of a rate of taxation not exceeding 50c.

We return herewith Mr. Pelton's letter.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

LOCAL TAX DISTRICT—ABOLITION

February 19, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. M. C. Terrell Superintendent of Public Schools of Alamance County, to you, in which he raises a question as to the interpretation of section 227 of the new school code in relation to the abolition of a district upon election. That section starts out thus:

Upon petition of one-half of the qualified voters residing in any local tax district *established under this article*. . .

There is a district in Alamance County, so Mr. Terrell states which was created by a special act of the Legislature but is under the control of the county board of education. Upon this he contends that section 227 does not apply to this district because it was created by a special act of the Legislature.

While we would not narrow the terms created under this article so as not to include special tax districts organized under sections 5526 to 5535 of the Consolidated Statutes, we think his contention is well founded, that this authority to abolish a district does not apply to one specially created by the Legislature before the constitutional amendment which prohibited such creation by the Legislature.

We return herewith Mr. Terrell's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL DISTRICT BONDS

February 19, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—We know of no case which has been decided nor any case pending, in which the question raised by Messrs. Storey, Thorndike, Palmer and Dodge in their letter to Mr. Bourne has been either raised or determined. There is a recent decision where bonds were issued under article 22 of the new school code, and was sustained by the Supreme Court.

It is quite clear, we think, that the bonds issued under the provisions of this statute are promises of the district, made on behalf of the district by the county. The county, as a corporate entity, could not itself pay these bonds out of its funds raised by general taxation, as decided by the Supreme Court of North Carolina in *Commissioners v. State Treasurer*, 174 N. C., 141.

We return herewith Mr. Bourne's letter and the copy of the letter of the bond attorneys attached.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SPECIAL CHARTER DISTRICT—BUILDINGS

March 8, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

ATTENTION OF MR. N. C. NEWBOLD.

DEAR SIR:—I have your letter of March 7th enclosing a letter from Mr. P. P. Pelton of Southern Pines, which I return herein.

I have read Mr. Pelton's letter, and while I was not inadvertent, in writing the previous letter, of the fact that school arrangements for the

colored children of Southern Pines had been made through the school at West Southern Pines, it was stated to me as a fact that this arrangement could not be further continued because of the lack of adequate school housing in West Southern Pines. I recognized the fact also that under the law arrangements have frequently been made, and I presume will be made, that certain children resident in one district on account of peculiar conditions, physical or otherwise have been permitted to attend the school in an adjoining district. But that is not the question involved here.

Under the charter of Southern Pines, which incorporates it as a school district and creates a board of trustees with control over the school and school property of the town, the duty of providing adequate school facilities for the school children of the town is enjoined upon said board. I do not see how the school board of Southern Pines can delegate this duty to another, nor do I see by what authority it can appropriate money to construct a public school building outside and beyond its corporate limits. I know that under the general law and under provisions in charters for particular towns and cities, power is given to the town authorities to buy land outside of the corporate limits for cemetery purposes, water purposes, sewer purposes, and lighting purposes, but the school is not one of these purposes.

I think this answers the letter of Mr. Pelton. It may be that the Legislature at its next session can enact such legislation as will cure the difficulty.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MARSH LANDS—STATUTE OF LIMITATIONS

March 15, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have examined carefully the report of Mr. Eric Norden on the Great Marsh lands in Currituck County. It is very clearly deducible from the statutes and decisions of North Carolina that even though a grant of swamp marsh lands is void under C. S., sec. 7540, yet actual possession of a tract of land so conveyed, using it for the only purposes for which it is useful, for a period of twenty-one years bars an action by the State or the State Board of Education. Mr. Norden's conclusion, then, that the various tracts set forth in his report, where the statute of limitations can be successfully invoked by the holders of grants, are vested in the grantees, is correct. C. S., sec. 7618.

His conclusion in regard to Grant No. 16478 to Capps and Bonney, dated February 13, 1905, which covers about one thousand acres of the Great Marsh immediately south of Knott's Island causeway, that it conveyed no title to Capps and Bonney, is, we think, also correct those parties under such conveyance not being protected by the statute of limitations. Consequently, Mr. Knapp as grantee of these parties has no title to said tract of land which could be successfully set up against the State Board of Education.

Of course, the situation is such as to appeal to the sense of equity of the State Board of Education in further dealings with Mr. Knapp in regard to this particular tract.

The general conclusion is, then, that except with reference to tracts of this Great Marsh heretofore granted by the State to various parties when the possession of those parties is protected by the statute of limitations, title to the same is vested in the State Board of Education and they have ample authority under the law to sell and convey the same.

We return herewith Mr. Norden's report.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EIGHT MONTHS' SCHOOL

March 22, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—Your letter of March 19th is received. You ask:

"Can the Legislature through the passage of a general law, compel the county commissioners to levy funds to maintain the schools for eight months?"

Answer: No, unless the question of extension from six to eight months is submitted to the voters of any county or district and approved by a majority of the qualified voters.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FORFEITURE—CLEAR PROCEEDS

March 28, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

Your letter of March 26th is received. In that letter you ask my opinion upon two questions:

(1) Whether the board of education can employ counsel to oppose the return of an automobile seized in transporting liquor:

(2) What expenses incurred in the apprehension of the rum seller and the seizure of the automobile can be deducted in the case, and who makes the deduction, and whether the county board of education has any interest or right to act in seeing to it that any payment in a matter of this sort is made to the school fund.

In section 6, chapter, 1, Public Laws of 1923, it is provided:

And the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens according to their priorities which are established by intervention or otherwise at said hearing or any other proceedings brought for said purpose as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation

of liquor, and shall pay the balance of the proceeds to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county.

This sets forth the interest of the county board of education in the proceeds to be derived from the sale of the seized transporting vehicle. It has the same interest under this statute as the county school fund has in the clear proceeds of all fines and forfeitures. In some counties heretofore I have known the county boards of education to employ counsel to investigate the county records to ascertain what fines and what forfeitures had not been paid to the school fund by the officers collecting them. I think this is a very legitimate expense. The burden of seizing and of holding the automobile transporting liquor seems to be cast upon the officer who makes the seizure.

A case has come to my attention lately where the officer seized an automobile, arrested the man in charge, held the automobile (and by "held" I mean stored it in a garage that rented space for the storage of automobiles). The person was finally convicted, the Court directed the officer to sell, and he sold the machine and it did not bring by a considerable sum the amount of the garage storage charges. I certainly do not think it contemplated by the statute that such expense as above indicated in the case used as an illustration should be borne by the officer personally. Either the general county fund or the school fund should bear the expense. In my opinion this expense should be borne by the county fund as it is borne in all cases where fines are imposed by law.

But this presents a difficult situation. Of course, the county fund is the fund which must be used to enforce the law and to pay the expense of its proper enforcement. The seizure of vehicles transporting whiskey is a part of the expense to be borne in the enforcement of the law. The county board of education has only an ultimate interest, to wit: to receive the balance of the proceeds after the expenses have been paid. The fixing the deductions to be made by way of costs and expense of seizure would be a part of the judgment of the Court condemning the property and directing its sale, as it is a part of the judgment of that Court as to what liens exist upon the seized property.

I, therefore, think it is largely a question for the sound judgment and discretion of the county board of education, whether it will employ counsel to see that an automobile seized for transporting liquor is properly condemned and sold. If in its sound judgment and discretion it is deemed wise to do so, then I think the expense is a proper expenditure.

(2) The expense incurred in the seizure of the vehicle transporting whiskey and other expenses are to be determined by the Judge of the Court condemning the property.

I return herein the letter of Mr. Isley, Superintendent of Schools of Caswell County.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CONSOLIDATION—APPORTIONMENT

April 4, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—I have your letter of March 21st, enclosing letter of Mr. John Hathcock, Superintendent of Public Instruction of Sampson County, in which you desire my opinion upon the facts stated in Mr. Hathcock's letter as follows:

Three special school tax districts of our county, namely, Clinton, Roseboro and Salemburg, have heretofore voted bond issues, the proceeds of which were used in the erection of school buildings in their respective districts. Since the voting of the said bonds, the Clinton District has been set out as a special chartered district in our county and is so operating today. Also, after the said bond issues were voted the General Assembly has directed in section 178, Public School Laws 1923, the Boards of Education to apportion to the special tax districts voting bonds their per capita part of the operating and equipment fund in the same way as the apportionment is made to the special chartered districts. Further, that this apportionment is continued until the amount of the bonds so issued by the district shall have been repaid by the county. Does this section apply to the bonds heretofore voted by the Salemburg and Roseboro school districts? It is understood that Clinton, a special chartered district, is getting its per capita of the taxes levied and collected annually, as is required in section 178.

I am of the opinion upon the foregoing facts that it is the duty of the Board of Education to apportion to the special tax districts voting bonds their per capita part of the operating and equipment fund in the same way as the apportionment is made to special charter districts, and this, regardless of whether the bonds were issued prior to the ratification of the consolidated school law by the Legislature of 1923, or after its ratification. I cannot believe that it was the purpose of the Legislature to restrict this apportionment to those districts issuing bonds after the ratification of the act.

I am returning herein the letter of Mr. Hathcock.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

AUSTRALIAN BALLOTS—SCHOOL ELECTIONS

April 19, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—We have considered the question presented by the letter of Mr. W. O. Griffith. We think that Chapter 65 Public Local Laws 1923 does not change the law as contained in Chapter 606 Public Local Laws 1917 as amended by Chapter 567 Public Local Laws 1919. With reference to school district elections, it seems quite clear that the general law is applicable and not the Australian ballot, unless such election is held on the same day, and at the same time as any general election, and if so, the Australian

ballot may be made to apply. This was the law at the time Chapter 65 *ut sup.* was enacted. It is suggested, however, that the following provision of that act makes the Australian ballot applicable even to school elections in the counties added therein: "that all elections held in said counties after the ratification of this act shall be held under the provisions of the laws herein specified." We do not agree with this contention. It is evident, we think, that the Legislature intended to bring new counties under the law as it existed, and not in any particular to make a new, or different law for those counties.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY BOARD—PURCHASE OF LAND

April 23, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—I have a letter from you of April 22d, enclosing letter from Mr. Thos. R. Foust under date of April 22d, in which you ask my opinion of the scheme proposed and outlined in that letter.

I do not think it is competent for the county board of education of Guilford County to purchase any lands except those needed for county school purposes. It seems from this letter that only a part of the Gillespie land now situate within the corporate limits of the city of Greensboro (but not within the limits of the school district of the city) is needed for public school purposes. As this Gillespie land is within the present corporate limits of the city of Greensboro, it would seem to me that the city council would have the right to purchase the same, holding it for such city purposes as the future needs of the city might suggest, and selling presently to the county board of education such part of this tract of land as is now needed for the South Buffalo School. If, as is contemplated, the present limits of the school district of the city of Greensboro shall be extended to the present boundaries of the city, then the remainder of the Gillespie property may be by the city authorities devoted to school purposes or to school and park purposes as the needs of the city may require.

I am venturing this opinion without any critical analysis of the powers granted to the city authorities by the charter of the city of Greensboro. But it seems to me that the city of Greensboro as a corporation is the only corporate body of the three mentioned that could purchase this property. As I have stated, I do not think the county board of education of the county of Guilford can buy the entire tract, and it does not seem that the school committee of the present school district of the city of Greensboro is competent to buy it, but as it is within the present boundaries of the city of Greensboro, the city authorities may be able to buy it and hold it for public purposes, the particular purposes to be declared later as the city's needs may develop.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL BUILDING—EXPENSES

May 2, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

Dear Sir:—You ask of this office an opinion upon the authority of a county board of education under section 284 of the new school code to assume the entire expense of erecting school building or buildings in a special chartered district of the county in lieu of lending the money derived from the State special building fund of said district. The words of the proviso to section 284 are very broad, as follows:

Provided nothing in this section shall prevent the county board of education from assuming the entire expense of erecting said building or buildings in any district of the county.

Section 64 of the school code which is to be considered in connection with section 284 in the opinion of this office is, however, as follows:

Board cannot erect or repair a building unless site is owned by the board. The county board of education shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the county board of education and the deed for the same is properly registered and deposited with the clerk of the court.

In most of the special chartered districts the title to the school property is in the board of trustees of that district. Section 177 also in its concluding clauses deals somewhat with this subject. This is as follows:

The board of trustees of all special charter districts may petition the board of education to take over the management of the school or schools within the special charter district. When such a petition is presented, the county board of education shall grant the petition, and the school or schools within the district shall be governed as all other schools in local tax districts are governed: Provided, the county board of education shall not have the authority to change the method of electing the board of trustees unless the charter is surrendered and the title to the property is transferred to the county board of education.

Section 157 provides the machinery for converting a special charter district into a local tax district. Construing all these sections together, it seems quite clear that the county board of education cannot assume the entire expense of erecting school buildings in any special charter district unless the charter has been theretofore surrendered and the title of the property is transferred to the county board of education. In dealing, then, with the State funds for building purposes, while the county board may use the funds for building in local tax or other districts in the county in which the title to the building would be in said county board without the district itself assuming any liability for the return of these funds, it may not do so with reference to special charter districts, but must, where the con-

ditions of the statute are complied with, loan the funds to such district in the absence of the change in its character under the statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL BONDS—VOTE

May 9, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—Yours of May 5th with attached papers, which I return herein, received.

Some of the matters presented are covered by the decision of the Court in the Gates County case, volume 187, page 244. The Court seems to have held that special charter districts are excepted. If there are special charter districts in the county of Rowan other than the town of Salisbury, then they should be excluded in the resolution adopted.

You desire my opinion upon the following questions:

(a) Can the commissioners issue bonds for new construction under the authority of a favorable vote under Article 18?

(b) Should all bonds be issued under Article 22?

(c) Can they hold an election for a tax for support under Article 18 and on the same day at the same places, with the same registration and same election officers, but in different boxes, hold a bond election under Article 22?

(d) If not, how can they secure both, the tax for support and the authority to issue bonds?

(a) Article 18 is for the purpose of obtaining a vote on the creation of a special school taxing district, and section 234, being the first section under that article, declares that "the following territorial divisions of the county are hereby declared to be special school taxing districts and special school taxes may be voted as hereinafter provided." (Then follows the territorial divisions.) This article does not deal with the question of bonds at all.

(b) Article 22 deals with the question of bonds, and I think that article covers the territorial divisions defined in Article 18, and what bonds are issued would have to be issued under Article 22 and in the prescribed manner.

(c) Upon proper petitions, as declared in Articles 18 and 22, an election can be held on the same day and at the same places, and on the same registration and by the same election officers, but with two boxes, for the tax election and the bond election—of course, always provided that the territorial divisions in which the elections are held are the same in both cases.

(d) The answer to question (c) covers (d).

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EMINENT DOMAIN—COUNTY BOARD

May 9, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

MY DEAR SIR:—Your letter of the 7th inst. is received.

You ask if the public schools through the county boards of education have the right to condemn land or an easement over land for pipe line to bring water to the school buildings. Section 142, Chapter 136, Public Laws of 1923 makes it the duty of the school committeemen to see that schools have a good water supply, and when there is lacking such good water supply, it is made the duty of the county board of education to make such provision as will give the teachers and children a good supply of wholesome water. Power to condemn land for a school site or to enlarge a school site is conferred upon the school authorities. I do not find any statute which authorizes the condemnation of an easement for a pipe line to carry the source of water supply to the school buildings. Such power is granted to State institutions, but I do not think that these sections embrace public schools. I am sorry that the language is not broad enough to include the public schools.

You will find the sections relating to State institutions to be Nos. 7522 and 7523 of the Consolidated Statutes.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REFUNDING BONDS

May 15, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—Your letter of the 12th inst., enclosing letter from Superintendent T. T. Murphy and Superintendent W. A. Graham, with reference to the decision of the Supreme Court of North Carolina in the recent case of *Lovelace v. Commissioners* of Rockingham, received. Let me suggest that on account of the number of inquiries about this decision that you have it printed and send it to Mr. Murphy and Mr. Graham and others who may inquire about it, as that point is so clear that there is nothing left to be said upon the subject. I had a full conference with Mr. Pittman and expressed to him fully my views about this case and the effect of the decision in connection with the Lacy case, and I do not see how anybody who has the capacity for being county superintendent of schools in the State can misconstrue this opinion.

The question in that case arose under the refunding provisions of the codified school law, chapter 136, Public Laws of 1923. It appeared that the county boards of education had borrowed money and built two school houses in districts which did not theretofore have school houses, and this borrowed money was unpaid. It was necessary to have the school buildings in order to maintain and carry on a school in each of the districts for six months. The county commissioners, pursuant to the refunding provisions of the above chapter, desired to issue county bonds to pay this indebtedness. The in-

debtedness amounted to \$49,000. The plaintiff, Lovelace, a citizen of the county, brought suit to restrain the issuance of bonds. The superior court judge dissolved the restraining order and denied the injunction. He appealed to the Supreme Court. The Supreme Court affirmed the ruling of the lower court in an opinion written by Justice Hoke for a unanimous court.

Let me again urge that you have this opinion printed. It is of great value to all of the county boards of education and the boards of county commissioners of the State.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL DISTRICT—EXTENSION OF CITY LIMITS

May 15, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

MY DEAR SIR:—I have your letter of May 12th, enclosing letter from John W. Carr, Jr., county superintendent, Durham. As pertinent to Mr. Carr's letter of inquiry, I refer you to our letter of January 17, 1924, in reference to a similar inquiry of Mr. R. H. Latham, superintendent of the city schools of Winston-Salem.

The special act of the Legislature of North Carolina enacted many years ago created as a school district the city of Durham. The limits of that city have been extended more than once since, and as the city limits were extended, automatically the limits of the school district were extended. Whether the amendment to section 29, article 2 of the Constitution prohibiting the Legislature from changing or altering by special act the lines of the school district, would prevent the making of the Durham school district coterminous with the enlarged boundaries as contemplated, I cannot say.

The two cases of *Trustees v. Trust Co.*, 181 N. C., 307, and *Sechrist v. Commissioners*, 181 N. C., 511, will furnish interesting reading upon this subject, but neither case is on all-fours with the one proposed. I also refer you to *Coble v. Commissioners* from Guilford County, 184 N. C., 342. These cases furnish all of the light that I am able to throw upon how far the Court will go in construing the provisions of Section 29, Article 2 of the Constitution on this subject.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

PUBLIC SCHOOLS—HIGH SCHOOL SUBJECTS

May 27, 1924.

HON. A. T. ALLEN, *State Supt. Public Instruction, Raleigh, N. C.*

DEAR SIR:—Your letter of May 22d, enclosing letter from Superintendent E. P. Bradley, Mocksville, N. C., in which he requests you to get my opinion on the following:

Section 35, page 13 of the school law authorizes the board of education on the recommendation of the county superintendent to determine in what schools high school subjects may be taught. Will you please get the Attorney-General's opinion as to whether or not the board can direct or permit high school subjects to be taught in schools contrary to the recommendation of the county superintendent?

Referring to the section, to wit: section 35 of the consolidated school law, it reads as follows:

The county board of education on recommendation of the county superintendent shall have authority to classify the schools of the county and determine the number of grades that each school shall contain, and in what schools high school subjects may be taught. But high school subjects shall not be taught in a school having only one teacher.

The question propounded by Mr. Bradley involves two matters: (1) Is the county board of education absolutely concluded by the recommendation of the county superintendent? (2) After having designated the schools in which high school subjects may be taught, is the county board of education restricted or prevented from designating one or more other schools? The one statutory restriction is that high school subjects shall not be taught in a school having only one teacher.

Answering the first question, in my opinion the county board of education is not absolutely concluded by the recommendations of the county superintendent.

Answering the second question, I think it is competent and within the power of the county board of education to extend to one or more schools the teaching of high school subjects after it is first ascertained and declared in what schools high school subjects may be taught, except, of course, those schools which have only one teacher.

If a conflict should arise, it does seem to me that it should be settled, and should be easily settled, by the exercise of a little prudence, foresight and self-control. The sole purpose is of course, to try to aid children within the school age.

I return Mr. Bradley's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BUILDING FUND—REPAYMENT

July 15, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—Superintendent Haithcock of Sampson County in his letter to you of July 12th, puts the following questions:

A particular school district has heretofore secured \$25,000 from the State special building fund. It purposes to have a bond issue in the same amount

and with the proceeds thereof repay to the State the \$25,000 loan heretofore secured before maturity. Can this be done?

We think this cannot be done, and we do not understand why a particular district would be willing to pay 6 per cent interest on a bond issue in order to pay off an indebtedness to the State when the indebtedness bears a smaller rate of interest.

This answers Mr. Haithcock's second question also, as the loan to a district by the county board of education is based upon the loan from the State to the county.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SPECIAL TAXES—PROCEEDS

July 15, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—Mr. J. B. Robertson, County Superintendent of Cabarrus County, asks this question in his letter of July 12th:

Is it legal to pay from the funds of a local tax district out in the country the three months' tuition to the city high school which is the three over and above the regular six months, when that local tax district out in the country has a term of only six months?

We think it is quite clear that the answer to this question should be "No." Taxes are voted in the district to aid in running the school out in the country. It would be a diversion of the funds to take any part of them to pay the tuition of scholars in the city high school.

The answer to this question answers Mr. Robertson's second question also.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTES—SPECIAL ACTS

July 22, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In yours of July 18th you state that Chapter 477, Public-Local Laws of 1923, fixes the salary of the county superintendent of schools of Currituck County at \$2,000 per year. This act was ratified March 3, 1923. The new school code, Chapter 136, Public Laws of 1923, was ratified on the same day. You wish to know whether or not under the new school code the salary of the superintendent of schools of Currituck County could be made more than the limit fixed by the special act.

Soon after the new school code was enacted, we interpreted it as including in it all the school laws then effective and that it was intended to be a codification of the whole law, and consequently, would override special acts fixing salaries of superintendents of schools. Since that ruling of this office

to Dr. Brooks, the Supreme Court in one or two cases has treated the new school code as not repealing the special acts, thus applying the general principle that special laws shall prevail though they conflict with the general act, unless it was plainly the intent of the Legislature to make the general act controlling.

We are compelled, then, to follow these Supreme Court decisions and hold that the special act in the particular case controls the amount of salary that can be allowed to the superintendent of public instruction.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

LABORERS' LIENS—SCHOOL BUILDING

July 25, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—Mr. T. T. Murphy, superintendent of schools in Pender County, in his letter of July 18th, presents certain difficulties that they are having with a contractor and sub-contractor in the erection of school buildings in the Long Creek and Atkinson districts.

Mr. Walter Clark seems to have been the contractor for these buildings and gave the statutory bond as required by section 2445 of the Consolidated Statutes. Mr. Clark sub-contracted the brick work to S. A. Miller. Miller's work was so unsatisfactory to the board of education and the architect in charge of the work, that he did not finish the sub-contract with Mr. Clark. Clark did not pay Miller all that Miller claims is now due him from Clark, so Miller has filed a labor claim against the board of education on each building, about \$300.00 on one and about \$400.00 on the other.

The board of education, upon the filing of this claim, wrote the attorney of Miller that when it settled in full with Mr. Clark, that it would deduct enough money to satisfy his (Miller's) claim, or require Clark to give bond covering the amount in question.

Thereafter Miller filed another claim for the loss of money and time, amounting to \$1,000.00 against one house and \$1,500.00 against the other. It does not appear whether this claim was for damages for breach of contract on the part of Clark or damages against the board of education for breach of contract on the part of the board of education.

Immediately upon the filing of these claims the board of education, in accordance with bond furnished by Mr. Clark on the original contract, notified the bonding company. Mr. Turner, the attorney for Mr. Miller, in his letter of July 16th to Mr. Murphy, is evidently, we think, (with all due respect to him) wrong in saying that Miller can in any way acquire a lien upon public school buildings. This was long ago determined in *Hardware Co. v. Graded Schools*, 150 N. C., 680.

Section 2445 of the Consolidated Statutes, as amended by Chapter 100, Public Laws of 1923, evidently intends that the board of education in erecting buildings of this sort shall require of the contractor of these buildings the bond provided for in this statute. When that bond is thus executed

and delivered to the board, it secures all valid labor and material claims either of laborers or sub-contractors against the contractor himself. The statute was enacted because laborers and material men could not obtain a lien upon a building devoted to the public use. The machinery by which such laborers or material men can protect their rights is also provided in these statutes. The bonding company has an equity probably to compel the board of education to hold up money in its hands due the contractor when claims are filed against the contractor for labor or material not paid for by him. But, after all, the claim of the laborer or material man is not against the board of education, but against the bondsman. Consequently, we think that the board of education in Pender County has pursued the proper course in the matter in notifying the bonding company and also in holding up temporarily the amount due Clark until the claim is settled. If, however, the bonding company makes no demand upon it to hold up this money, we understand from the statute that the board of education would incur no liability to Miller if it paid it over to Clark, the bonding company consenting to such payment.

We return herewith Mr. Murphy's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CONSOLIDATION—NEW SCHOOL CODE

August 18, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—In reply to yours of August 14th.

If we allow any force at all to the fact that the new school code was essentially a codification and revision of all school laws then it necessarily repealed Chapter 39 of the Public-Local Laws of 1923, because that new school code undertook to define definitely and distinctly the conditions upon which consolidation could be had in the various counties of the State. We do not lay any stress upon the fact that Chapter 39 of the Public-Local Laws of 1923 was ratified February 3, 1923, while the new school code was ratified March 3d of the same year, for that code did not go into effect until April 15, 1923, but simply upon the ground that the General Assembly intended to legislate once for all upon the subject of consolidation of school districts.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FINES AND FORFEITURES—CLEAR PROCEEDS

August 29, 1924.

HON. A. T. ALLEN, *State Superintendent Public Instruction, Raleigh, N. C.*

DEAR SIR:—The letter of Mr. Robt. W. Isley, Superintendent of Public Instruction for Caswell County, to you presents two questions: First, a young man was convicted for impersonating an officer in Caswell County and he was fined \$50.00. It seems that an attorney acted for the private prosecu-

tion in the matter. Upon this Mr. Isley inquires whether or not the county board of education has a legal right to devote \$40.00 of the fine in the payment of this attorney. We think not.

Second. A man is arrested on the charge of manufacturing whiskey, and at the preliminary examination he is put under a bond of \$500.00, but he does not appear in court and the bond is forfeited. Sci. Fa. was issued to his bondsmen to show cause why judgment absolute should not be entered on the bond. The total amount, \$500.00, is collected. The court makes no entry that the cost of the original prosecution should be paid out of this \$500.00. Upon this Mr. Isley wishes to know what costs are to be deducted, to which we reply that only the costs incident to the Sci. Fa. are to be deducted. The clear proceeds of such forfeitures are the face amount of the forfeiture less the expense of collecting that forfeiture. *State v. Maultsby*, 139 N. C., 583; *In re: Wiggins*, 171 N. C., 372.

The judges of the superior court are given very extensive discretion in dealing with forfeited recognizances in C. S., sec. 4588. It seems that this discretion was not exercised in the particular case. See *Board of Education v. Moody*, 74 N. C., 73; *State v. Morgan*, 136 N. C., 600.

We return Mr. Isley's letter herein.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUSTICES OF THE PEACE—FINES

March 5, 1923.

MR. A. S. BROWER, *Director of Finance, State Board of Education, Raleigh, N. C.*

DEAR SIR:—In reply to yours of March 2d.

Unless there is a special statute applicable only to Lee County, no justice of the peace in that county has any authority to turn over to the clerk of the court of that county the fines collected by him in criminal actions in his court. The law requires justices of the peace to pay over such fines to the county treasurer. If, therefore, they are turned over to the clerk of the court he receives them without authority of law, and so has no right to charge the 5 per cent fee for collecting them.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE CORPORATION COMMISSION

BANKS—INCORPORATION—PURPOSES

August 26, 1922.

MR. CLARENCE LATHAM, *Chief State Bank Examiner, Raleigh, N. C.*

IN RE: *Certificate of Merchants & Farmers Bank of Pineville.*

DEAR SIR:—We have examined this certificate carefully and have come to the conclusion that section 10, the last clause of section 13, and the whole of section 14 of the objects of this incorporation are not such as are cognate to the purpose for which the bank is organized. Trust companies of the banking act are those receiving money on deposit. Sub-section 3 of section 2 of the act permits the incorporation of a commercial bank, savings bank, trust company, or a combination of two or more, or all of such classes of business. Section 10 of the articles proposes to make the bank a guarantor for the payment of almost all forms of indebtedness. The latter clause of section 13 attempts to authorize the bank to do a fidelity and insurance business. Section 14 attempts to authorize the bank to do a general insurance agency business. In each of these cases the Insurance Commissioner only has authority to act in behalf of the State. They are not the kind of businesses which the banking act contemplates should be done by banks or the character of trust companies authorized to be incorporated in the banking act.

We return herewith the certificate.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTES—REPEAL BY IMPLICATION

September 26, 1922.

HON. GEO. P. PELL, *Corporation Commission, Raleigh, N. C.*

DEAR SIR:—In reply to yours of September 25th.

No doubt the principle which was puzzling you in its application to the banking laws of 1921 as repealing the chapter on banks in the Consolidated Statutes is as follows:

Where the later statute was manifestly intended to cover and provide for the subject matter of the earlier law, not only by omission, but by addition and alteration, the later act repeals the earlier by necessary implication.

It seems to us, however, that that rule is applicable only when the Legislature itself is silent as to the extent of the repeal. In other words, where in a more recent act of the Legislature evidently intends to cover the whole subject of a former act and has no clause in the later act defining the extent

of the repeal, then the former act is repealed by implication. You will find quite an enlightening discussion of this subject in *Murdock v. Mayer of Memphis*, 20 Wall (U. S.), 590, et seq.

The banking act of 1921, Chapter 4, Public Laws, expressly defines in section 88 the extent of the repeal of former acts:

All laws and parts of laws in conflict with this act are hereby repealed.

Consequently, if there is any provision in Chapter 5 of the Consolidated Statutes of 1919 which does not in fact or by necessary implication, conflict with the provisions of the act of 1921, then such provision is still in force. In case of conflict, however, either in so many words or by necessary implication, the later act is the law, the older act has been repealed.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANKS—INSOLVENCY—PROOF OF CLAIM

December 2, 1922.

CORPORATION COMMISSION, *Raleigh, N. C.*

ATTENTION OF MR. CLARENCE LATHAM, *Chief Bank Examiner.*

DEAR SIR:—We have been so much pressed with work in the office that we have been unable to give the letter of Messrs. Doyle & Smith, addressed to you, proper consideration until today.

Our understanding of your letter is that you desire an answer only to the questions propounded in "3" of Doyle & Smith's letter. Those questions are as follows:

"3. What procedure do you follow in the liquidation of insolvent banks with respect to the claims of secured creditors?
(a) Do you allow the claim for the full amount due at the time of the failure and pay dividends on that amount, regardless of the collateral, or (b) do you require the claim to be reduced to the extent of the value of the collateral, and allow for the balance, or (c) do you reject the claim entirely merely because there is collateral?

Our Court has held that a debt, though secured by collateral, is entitled to share pro rata in the distribution of the funds of an insolvent corporation of the full amount of the debt as it existed when such securities were given. *Brown v. Bank*, 79 N. C., 244; *Winston v. Biggs*, 117 N. C., 206; *Bank v. Flippin*, 158 N. C., 234. The latter case cites with approval *Merrill v. The Bank*, 173 U. S., 131, to the effect that a secured creditor of an insolvent corporation may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, after such declaration subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full. *Bank v. Flippin*, also

cites many cases to the same effect in other states. It was approved in *Milling Co. v. Stephenson*, 161 N. C., 510.

We return herewith letter of Messrs. Doyle & Smith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANKS—CERTIFICATE OF INCORPORATION

December 4, 1922.

MR. CLARENCE LATHAM, *Chief Bank Examiner, Raleigh, N. C.*

DEAR SIR:—I have yours of the 29th ult., enclosing copy of proposed certificate of incorporation of the Continental Trust Company of Charlotte, N. C., and in which letter you ask my opinion as to whether or not the powers granted by the proposed charter conform to the banking act of 1921.

I have examined this charter and I think the following numbered subdivisions under the heading "The objects for which this corporation is formed" are as follows, to wit:

(c) Which is very much broader in my opinion than is permitted by the banking law;

(g) Is likewise in my opinion too broad;

(i) I also think the powers granted in (i) are too broad, in that it permits "the company to endorse or become surety for any person or persons or corporations, and also to guarantee to the lender of money the payment of both principal and interest." These are both exceedingly dangerous powers to be conferred upon an institution that proposes to act as a fiduciary company.

In one sense, every bank that rediscounts its paper has to do so by an endorsement, and to that extent is a surety for the makers of the paper. But that is not the original contract. That grows out of the contract of the sale of the paper by the bank to a purchaser, and in order to pass the title and to be bound as endorser, the bank endorses the paper. It is, however, not a part of the contract entered into between this company and the borrower of money.

With these criticisms of this character, I think otherwise it is not contrary to the banking laws, although its powers were very broad and very varied.

As to the powers granted in sub-division (c), I am at a loss to conceive the purpose of these. They are not in my opinion in conformity with the State banking act, and I do not see why a corporation of this character should desire the power to deal in personal property without limit.

The other sub-divisions in my opinion also clearly contravenes the powers prescribed in the State banking act.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

NATIONAL BANKS—STATE STATUTES

December 18, 1922.

HON. GEO. P. PELL, *Corporation Commissioner, Raleigh, N. C.*

DEAR SIR:—This is a delayed answer to your letter of November 6th.

It is very clear, we think, under the decision of the U. S. Supreme Court, that sections 83, 84 and 85 of the banking act do not apply to employees of national banks. In *Cross v. North Carolina*, 132 U. S., 131, the Court points out the distinction between crimes defined and punishable at common law or by the general statutes of the State, and crimes and offenses cognizable under the authority of the United States. It is held in that case that the crime of forging promissory notes purporting to be made by individuals and made payable to or at a national bank, was a distinct and separate offense and indictable under the laws of the State. In *Eastern v. Iowa*, 188 U. S., 220, it is held expressly, that a State is without lawful power to declare certain acts to be criminal offenses and then make such special laws applicable to banks organized and operating under the laws of the United States. The discussion in that case clearly shows that sections 83, 84 and 85 are not applicable to national banks. Indeed, it holds a statute of Iowa in almost identical terms with section 85 not applicable to national banks.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANKS—STOCK—HALF SHARES

January 25, 1923.

HON. GEO. P. PELL, *Corporation Commissioner, Raleigh, N. C.*

DEAR SIR:—In reply to yours of January 24th.

We think a State bank has not authority to issue a half share of stock in endeavoring to comply with Section 59 of the Banking Law of 1921. The provisions of sub-section 4 of section 2 of that act are mandatory. It declares that the amount of its authorized capital stock shall be divided into shares of \$50.00 or \$100.00 each. Section 21 makes each stockholder liable to creditors in case of insolvency of the bank, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares. Section 59, it seems to us is an administrative measure. If a bank, then, in attempting to comply with its provisions, should in following them strictly find that it would be necessary to issue a half share, it may disregard following the section strictly and may confine itself to issuing full shares, in attempt to comply with it. For instance, if one has three shares in a bank, the par value of whose shares is \$100.00, with the bank's authorized capital \$10,000.00 and a surplus of \$10,000.00, he could receive only \$100.00 stock dividend of the surplus distributed in accordance with this section. In order to avoid this difficulty, however, a bank may in its by-laws provide for issuing this stock, in order to make equality of the division of the surplus as stock dividend, to a trustee for the benefit of those who would be entitled to only half shares, or in some other way so as to

conform to the mandatory provisions that its capital stock shall be divided into shares of \$50.00 or \$100.00.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BUILDING AND LOAN ASSOCIATION

May 12, 1923.

CORPORATION COMMISSION, *Raleigh, N. C.*

ATTENTION OF MR. R. O. SELF.

DEAR SIR:—I can conceive of no reason why the Citizens Savings & Loan Company were licensed by the Insurance Commissioner except that they were doing a building and loan business. License there was imposed under Consolidated Statutes 5186. If this assumption is true, the recent act of the Legislature putting industrial banks under the control of the Corporation Commission does not affect the control of the Insurance Commissioner over this company. C. S., sec. 5169, defines the term, building and loan association, and declares that it shall apply to and include all corporations, companies, societies and associations organized for the purpose of making loans to its members only and enabling its members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. If the above named corporation was organized under this act and this definition applies to them, they are still under the control of the Insurance Commissioner and have to pay the annual license fees provided by Section 5186.

We return herewith the letter of Mr. Porter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TRUST COMPANIES

July 12, 1923.

MR. CLARENCE LATHAM, *Chief Bank Examiner, Raleigh, N. C.*

DEAR SIR:—Section 7 of Chapter 4 of the Public Laws of 1921 requires such companies as the Ayden Realty & Trust Company, before beginning business, to file with the Corporation Commission a statement under oath containing matter set forth in the section. Thus, it is brought under the jurisdiction of the Corporation Commission and is authorized to use the name "trust" in its title. In addition to this, when the company attempts to act as a fiduciary, which it is authorized to do under section 3 of the certificate sent us, it must apply to the Insurance Commissioner under C. S., sec. 6376, et seq. Manifestly, then, this company does not come under the recent industrial bank act, Chapter 225, Public Laws of 1923.

We return herewith the certificate of incorporation sent us.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INDUSTRIAL BANKS—LIABILITY OF STOCKHOLDERS

September 22, 1923.

HON. GEO. P. FELL, *Corporation Commissioner, Raleigh, N. C.*

DEAR SIR:—In reply to yours of September 21st.

You inquire in your letter whether or not in the opinion of this office the double liability statute, Section 21 of the Banking Act, applies to the stockholders of Morris Plan Banks and Industrial Banks. As you recall, the term "bank" is defined in section 1 of the act of 1921, and it is there declared that the definition shall not be construed to include Building and Loan Associations, Morris Plan Companies, Industrial Banks or Trust Companies not receiving money on deposit. There being some ambiguity in the latter term, the General Assembly of North Carolina was called upon at the session of 1923 to legislate further upon the question—Chapter 225, Public Laws, 1923. There was no change made in that act with reference to the organization of these Industrial Banks. They were, however, definitely and distinctly placed under the supervision of the Corporation Commission.

In section 13 of this act, the Legislature specifically declared what sections of the Banking Act of 1921 should be applicable to these institutions. From this declaration it omits section 21. Thus, it may be assumed that the Legislature had the whole subject present in its mind at the time that it was legislating and refused to make section 21 applicable to them. We, therefore, think that the double liability imposed by that section does not apply to these institutions.

The Attorney-General coincides with this view.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

INDUSTRIAL BANKS—STOCK—ORGANIZATION

October 26, 1923.

CORPORATION COMMISSION, *Raleigh, N. C.*ATTENTION OF MR. CLARENCE LATHAM, *Chief Bank Examiner.*

DEAR SIR:—You inquire whether or not in the opinion of this office the capital stock provided for industrial banks at the time of their organization under Section 4 of Chapter 225 of the Public Laws of 1923, shall be wholly paid in before you can authorize such bank to commence business. We think that the full amount should be paid in before these banks are authorized to do business. The act providing for their organization, chapter 225, *supra*, contains no provision similar to Section 6, Chapter 4, of the Public Laws of 1921, the banking act. On the contrary, section 13 of the act of 1923 in declaring what sections of the general banking act, chapter 4 above, shall be applicable to industrial banks, omits section 6 of said banking act. We construe this as necessarily preventing the application of section 6 to industrial banks. That section in part permits an ordinary bank to be organized upon the paying in of 50 per cent of its capital stock in cash, with the re-

mainder of the capital stock to be paid in monthly installments of at least 10 per cent in cash of the whole capital, payable at the end of each succeeding month.

For these reasons we think that the total capital stock of industrial banks should be paid in before you authorize them to commence business.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—BANK TAXATION

November 6, 1923.

MR. CLARENCE LATHAM, *Chief State Bank Examiner, Raleigh, N. C.*

DEAR SIR:—In reply to yours of November 3d.

There is nothing in the Revenue Act or the Machinery Act which would prevent a municipality from levying a privilege tax upon state banks doing business within its limits. If, therefore, it has charter authority to levy a tax upon business of this character, there is no reason why it should not levy it, if it chooses to do so. Banks do not pay a franchise tax under Section 89 of the Revenue Act, and so the last clause in that section does not affect the authority of towns in the particular discussed.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CORPORATION COMMISSION—TRANSFER OF DUTIES

January 18, 1924.

MR. R. O. SELF, *Corporation Commission, Raleigh, N. C.*

MY DEAR SIR:—Replying to your request for my opinion as to whether or not the duties prescribed under section 1148 to be performed by the Corporation Commission and the duties imposed by said section upon corporations have been by the Act of 1921, Chapter 40, referred to the Department of Revenue. I think that the duties imposed by this section upon the Corporation Commission have been transferred to the Department of Revenue, and that the corporations should make such reports to that department.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BANKS—PAR CLEARANCE

April 25, 1924.

MR. CLARENCE LATHAM, *Chief State Bank Examiner, Raleigh, N. C.*

DEAR SIR:—You ask an opinion of this office as to the right of a State bank to charge exchange on items presented across its counter by another bank located in the same town or city. Stated in other terms, the question is, does Chapter 20 of the Public Laws of 1921 apply to such a transaction? Section 1 of the act permits all banks and trust companies in the State of North Caro-

lina to charge a fee not in excess of $\frac{1}{8}$ of 1 per cent on *remittances* covering checks the minimum fee on any remittance therefore to be 10 cents. It is manifest from the very wording of section 1, we think, that it does not apply to the situation outlined by you, that not involving a remittance.

Section 2 of the act changes materially the common law right of the drawer of a check or the holder of that check previously drawn to demand cash under all circumstances when the check is presented at the counter of the bank. In order that this old rule should apply now, the drawer or maker of the check must specify on the face thereof that it is to be paid in cash. This section, however, is expressly limited to checks presented by or through any Federal Reserve Bank, postoffice, or express company, or any respective agents thereof.

If, then, the other bank located in the same town or city does not come within the designation of this class it may demand cash of the bank when it presents checks drawn upon that bank at its counter. One of the very grounds upon which the constitutionality of the act was attacked in *Farmers & Merchants Bank v. Federal Reserve Bank*, 262 U. S., 649, was that the Federal Reserve Bank was denied the equal protection of the law because other banks with whom it might conceivably compete may demand cash, except in those cases where they present a check through an express company or postoffice.

Manifestly, we think the class of banks which may be deemed cash, notwithstanding the act, includes the bank described by you, provided, of course, that bank is not a Federal Reserve Bank or an agent of such bank.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INDUSTRIAL BANKS—PREFERRED STOCK

May 27, 1924.

CORPORATION COMMISSION, *Banking Department, Raleigh, N. C.*

ATTENTION OF MR. CLARENCE LATHAM, *Chief State Bank Examiner.*

DEAR SIR:—Yours of the 27th inst. received.

I have read over the whole charter of the Wilmington Loan and Finance Company, and it seems to me that this company has all the power given to industrial banks and that its charter should, therefore, conform to the charter permitted for industrial banks.

By the act of 1923 the minimum capital for Wilmington would be \$100,000. While the act of 1923 does not expressly prohibit an industrial bank from issuing two classes of stock, preferred and common, the power to issue two classes is not given, but section 4 of the act of 1923 would certainly seem opposed to the idea of two classes of stock. The authorized capital of the Wilmington Loan and Finance Company is large enough, to wit: \$200,000, but it contains the provision that the company may commence business on fifteen shares of \$25 each. In addition, it contains provisions in regard to the issue of preferred stock.

In regard to the directors of the corporation, it is provided in section 9 of the act of 1923 that at least three-fourths of the number of directors shall be residents of the State of North Carolina.

The powers of the corporation as stated in its proposed charter are almost identical with the powers enumerated in the act for industrial banks. You compare the first objects enumerated with the first enumeration of powers of section 6 of the act of 1923, and it is identical. Sub-section 2 seems to be identical. Sub-section 3 is identical.

In this proposed charter they omit any authority to establish any branches, and sub-section 4 is nothing more than the usual power granted to such corporations.

I think that charter ought to be returned for redrafting.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

RAILROADS—RECEIVERS OF FEDERAL COURTS

June 25, 1924.

HON. GEO. P. PELL, *Corporation Commissioner, Raleigh, N. C.*

DEAR SIR:—In the absence of Judge Manning this morning, I undertake to answer your letter June 24th in regard to the authority of the Corporation Commission over the operation of railroads by receivers appointed by the Federal Court.

The statute which seems to be applicable is section 1047 of the Compiled Statutes of 1918, which is as follows:

Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

This statute has been construed in a number of cases, but the case more directly applicable is *Erb v. Morasch*, 177 U. S., 584, and in *U. S. v. Nixon*, 235 U. S., 234. The first case arose out of the enforcement of a town ordinance regulating the speed of interstate railroads while passing through the town against the receiver of the railroad. The court there held that the receiver was liable in the same way for breach of this law as the railroad would have been had no receiver been appointed.

I have been unable to find a case directly in point in which a public service commission undertook to regulate the conduct of a railroad in the hands of a receiver. Where, however, the regulation attempted by the commission is merely carrying into effect a police regulation which is applicable to railroads at large, it seems that the principle established in the above mentioned cases would apply and it would be justified. The practical difficulty would be in enforcing an order of the commission, and for that reason

it might perhaps be well to apply to the court which appointed the receiver to approve the order. See Section 1048 of Compiled Statutes of 1918.

Very truly yours,

FRANK NASH.
Assistant Attorney-General.

CORPORATION COMMISSION—UNDERPASSES

March 15, 1924.

HON. GEO. P. PELL, *Corporation Commissioner, Raleigh, N. C.*

DEAR SIR:—In reply to yours of March 12th.

You put the following questions to this office:

(1) Has the Corporation Commission power under the existing statutes to force a railroad to construct an underpass or overhead bridge or participate in its expense, where they do not have to either raise or lower their track, either inside or outside of the corporate limits of the city?

The statute immediately involved in considering this question is C. S., sec. 1048, which is as follows:

The commissioners are empowered and directed to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and to designate who shall pay for the same; and when they think proper partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested.

Your question, then, may be considered, first, as to the authority of the Corporation Commission dealing with the highway crossing a railroad at grade outside of the limits of a municipal corporation. It appears to us that the terms used by the Legislature in section 1048 in conferring the authority upon the Corporation Commission, "empowered and directed," are mandatory in their effect. The first clause of the section, too, does not limit the authority of the Commission to a case where the raising or lowering of any track is necessary, for it places in the alternative "or highway." If the same result may be accomplished by lowering the highway or raising the highway without interfering with the present grade of the railroad, then the Corporation Commission has as much authority in the latter instance as it does in the former. In *Tate v. Railroad*, 168 N. C. 523, the Supreme Court (the Chief Justice delivering the opinion arguendo) sustains this view. Second. Where, however, the grade crossing is within the limits of the municipal corporation having authority under its charter to compel the abolition of a grade crossing, the authority of the Corporation Commission to act in lieu of the city or town in which the grade crossing is located is more doubtful. In *Railroad Co. v. Goldsboro*, 155 N. C. 356, the Court treats this authority of the Corporation Commission as supplementary to that conferred upon towns and cities in their charters. This is affirmed in *State v. Railroad Co.*, 164 N. C. 422. As you know, the authorities of cities in such matters was again presented to the Supreme Court in *Durham v. The Railroad*, 185 N. C. 240. In that case you will find a full discussion

of the authority of municipalities. The writ of error to the Supreme Court of North Carolina from the Supreme Court of the United States in this case is now pending in the latter Court.

We see no reason, therefore, why, if a municipality applies to the Corporation Commission under C. S., sec. 1048, to abolish a grade crossing within its limits, accompanied by a request that the Corporation Commission apportion the cost between the municipality and the railroad, this cannot be done. There being, however, this doubt as to whether the Corporation Commission can compel outright the abolition of grade crossings within the limits of the city at the expense of the railroad alone, naturally, cities and towns would prefer to act under their own charters instead of applying to the Commission, such action having been sustained in *Durham v. Railroad Co.*, *supra*, and the other cases cited in this letter.

(2) Has the Corporation Commission any power to compel the railroad company to rebuild or participate in the rebuilding of an old wooden bridge already constructed over a railroad track?

We think they have the power.

This does not apply to the highways of the State system, the State Highway Commission, having authority under the statute to compel the abolishment of grade crossings.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

NEGOTIABLE INSTRUMENTS—PRESENTMENT FOR PAYMENT

August 15, 1924.

MR. C. C. MERONEY, *Banking Department, Corporation Commission, Raleigh, N. C.*

DEAR SIR:—You ask the opinion of this office upon the following facts:

A note payable to S. C. Company, with E and L as makers was due on June 20th and payable at the Planters Bank of Pinetops, N. C. The note was sent by a Richmond bank to the Pinetops Banking Company of Pinetops, N. C., for collection. The makers of the note resided in Pinetops. The latter bank claims to have sent a notice to the makers of the note and then held it until the close of banking hours on the day on which it was due and presented to the Planters Bank of Pinetops after banking hours, but before that bank was closed. The note was not paid on such presentation, and was protested. E and L declined to pay the protest charges on the ground that the note was not presented to the Planters Bank of Pinetops during banking hours.

Upon this you inquire whether or not due presentment was made in such way as to bind the makers for the protest fees incurred by the protest of this note for non-payment. The statute which deals with this question is section 3056 of the Consolidated Statutes of 1919, and is as follows:

Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

The statute itself is so clear as to need no comment from us. It appears that E and L did not have funds at the bank at which their note was payable—the Planters Bank of Pinetops—to discharge the said note if it had been presented during banking hours. Consequently, the presentation after banking hours but before the bank was closed on that day was sufficient.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

OPINIONS TO THE COMMISSIONER OF AGRICULTURE

BOARD OF AGRICULTURE—COMMITTEES

June 16, 1923.

HON. WM. A. GRAHAM, *Commissioner of Agriculture, Raleigh, N. C.*

DEAR SIR:—Whether or not the Commissioner of Agriculture, by and with the consent and advice of the Board of Agriculture, may abolish the Farmers Institute provided for in C. S., sec. 4688, sub-section 12, is a matter of serious doubt. Still, the power of the Commissioner and the Board is very large in such matters, particularly with reference to Farmers Institutes. If you will observe, sub-section 12 commences with this clause:

With the holding of Farmers Institutes in the counties of the State as frequently as may deemed advisable.

This, of course, places large discretion in the hands of the Board and the Commissioner of Agriculture. They may suspend the holding of these institutes, certainly for a period certain, if not abolish them entirely.

C. S., sec. 4667, authorizes the Governor to appoint members of the Board of Agriculture by and with the consent of the Senate. It seems that there were two vacancies which were filled by appointment of the Governor and confirmed by the Senate at the recent session of the General Assembly. You state that the members whose terms expired had certain duties imposed upon them as members of a joint committee, and you inquire whether Messrs. McGougan and Brown succeed also to the membership of the joint committee, held by their predecessors, by virtue of the Governor's appointment. Section 4670 authorizes the Board to elect from its numbers an executive committee of four and also a finance committee of five. If the joint committee spoken of by you is either one of these committees, the new appointees must be placed upon these committees by the Board itself. Section 4679 requires the selection of the four members of the joint committee to be made by the Board of which they are members. Of course, then, Messrs. McGougan and Brown upon their appointment by the Governor do not automatically succeed their predecessors upon the joint committee, but the Board itself must determine who shall be the members upon such committee.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

AGRICULTURAL EXTENSION WORK

June 25, 1923.

HON. WM. A. GRAHAM, *Commissioner of Agriculture, Raleigh, N. C.*

DEAR SIR:—In reply to yours of June 25th.

We think it makes no difference that the clause in the act of 1915 "and does hereby require the trustees of the North Carolina College of Agriculture

and Mechanic Arts to administer this fund through the agricultural extension department of that college." was omitted from all the appropriation acts since, to and including the appropriation act of 1923. The act of Congress providing for coöperation in extension work expressly requires the fund to be administered through a college or colleges in each state. Where there is more than one college, the legislature of the particular state is to designate the college to receive the fund. The act of 1915 did this and so it was unnecessary to repeat the designation. All the appropriation acts since, interpreted in connection with the act of Congress (Comp. Stat., 1918, secs. 8877a, et seq.) requires this fund to be administered through what is commonly called the State College.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TICK ERADICATION

August 21, 1923.

DR. WILLIAM MOORE, *State Veterinarian, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. T. W. Costen, left with us this morning. He states they are having some trouble in courts of justices of the peace because, if a criminal action brought upon the tick eradication act, Chapter 146 of the Public Laws of 1923, is dismissed by a justice of the peace, the State has no right of appeal.

This is true, but it does not prevent a further prosecution of the person charged with the offense against the act in other courts, because a justice of the peace does not have jurisdiction of the offense charged. Section 13 of the act defines offenses of this character as misdemeanors and fixes no punishment for them. As a consequence, the punishment is at the discretion of the court.

Mr. Costen asks other questions which we will answer seriatim.

Section 5 of the act requires the State Veterinarian to appoint the necessary number of local State inspectors to assist in systematic tick eradication, who shall be commissioned by the Commissioner of Agriculture as quarantine inspectors. If the services of any such inspector are not satisfactory to the State Veterinarian, his services shall be immediately discontinued and his commission canceled. We think under these conditions that these county inspectors are merely employees of the State Government and not public officials. If, however, they are public officials, the failure to take the oath of office as such would not invalidate their acts as to the public and third persons, but would only subject them to indictment.

Mr. Costen then inquires: "Is the five days' notice provided in section 9 of the act to be given to every owner of stock to be dipped?" This five days' notice, we think, is to be given by the quarantine inspector to all persons who fail or refuse to dip the animals regularly every fourteen days and is the foundation of his authority to act in case the owner fail or refuse to dip, by taking charge of the situation himself and placing the cattle in quarantine, and dipping them at the expense of the owner. Of course, if the owners conform to the law and dip every fourteen days in that way,

there is no necessity for the written notice to them. The statute requires in section 7 that they should be dipped.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BAKERIES ACT—ENFORCEMENT

March 5, 1924.

DR. W. M. ALLEN, *State Chemist, Raleigh, N. C.*

DEAR SIR:—In reply to yours of March 4th.

You state in your letter that it is your understanding that failure on the part of the operator of a bakery to pay the inspection tax during the month of May, as provided for in Section 9 of the Bakeries' Act, Chapter 173, Public Laws 1921, is a violation of the act and is subject, on conviction, to the penalty of section 10.

We think you are right in your construction of the law. Section 10 declares that any person, firm or corporation which shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not exceeding \$25.00 for the first offense. For the first offense, then, the crime is placed within the jurisdiction of a justice of the peace. It is only when a second offense has been committed that it comes within the jurisdiction of the superior court.

If you intend to enforce this criminal feature against those who have not paid the inspection fee, we suggest that you do it upon complaint of your inspectors made to a local justice of the peace.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

GASOLINE INSPECTION FEES

March 28, 1924.

MR. W. M. ALLEN, *State Chemist, Raleigh, N. C.*

DEAR SIR:—Your letter of the 22d of March is received.

Under the provisions of the law, I think that the method that the Atlantic Refining Company proposes for the payment of its tax is what the law authorizes. If the Standard Oil Company pays an inspection tax upon all gasoline stored in the State, it does so voluntarily. The inspection is collected upon gasoline sold or offered for sale in the State, and not upon gasoline stored in the State and not sold here.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—FRUIT PEDDLERS

June 21, 1924.

MR. GEO. R. ROSS, *Chier, Division of Markets, Raleigh, N. C.*

DEAR SIR:—In reply to yours of June 20th.

Section 45 of the Revenue Act, which levies license upon peddlers therein defined, has this provision:

This section shall not apply to those who sell or offer for sale fruits, provided that the governing body of any town or city having a population of five thousand or more may license and regulate the foregoing in such manner as said governing body may deem advisable.

This proviso speaks for itself. We interpret it, however, as not allowing the town to levy a license tax specifically on those coming from without its limits with fruits for sale when they do not levy the same license tax for the same act upon citizens of the town. *State v. Williams*, 158 N. C., 611. This, we think, will furnish you with the information desired in dealing with the action of towns in levying a license tax upon fruit growers who send their fruit to such towns for sale.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

EXPERIMENT STATIONS AND TEST FARMS

July 3, 1924.

HON. WM. A. GRAHAM, *Commissioner of Agriculture, Raleigh, N. C.*

DEAR SIR:—The statutes in regard to the control of agricultural experiment stations and branch stations seem to be somewhat contradictory. C. S., sec. 4682, requires the agricultural experiment stations and the test farms, which are designated as branch experiment stations, to be conducted under the auspices of the board of agriculture and out of its funds. C. S., sec. 5825, declares that the agricultural experiment and control station shall be connected with the State College of Agriculture and Engineering, and controlled by the board of trustees thereof. Both of these acts were passed in 1907; the first one, section 4682, being Section 5 of Chapter 876 of those laws, whereas, Section 5825 is Section 12 of Chapter 406 of the Laws of 1907.

Thereafter the General Assembly on March 7, 1913, enacted Chapter 68 of the Public Laws of 1913. That act is entitled "An act to authorize the State Board of Agriculture and the board of trustees of the N. C. College of Agriculture and Mechanic Arts to coöperate in such work as both boards are doing, so as to avoid expense of duplication." That act provided for a joint committee for agricultural work composed of four members from each of the boards of agriculture and the trustees of the college.

The General Assembly of 1917, in Chapter 223, amended Section 1 of the Acts of 1913, leaving the provision that a joint committee should be composed of four members each of the board of agriculture and the trustees of the college, but in addition thereto, declared that the Governor of the State, the Commissioner of Agriculture and the president of the college should be ex officio members of said committee. Both of these acts are brought forward in the Consolidated Statutes as Part 3 of Article 1 of Chapter 84. This joint committee, it is declared, especially shall have supervision and control of all experimental and investigational work in the State. It shall determine and employ such workers as may be necessary for the conduct of the work and regulate their salaries and duties.

The Consolidated Statutes as a completed law went into effect August 1, 1919. We thus have what is apparent conflict between provisions of a general law which went into effect on the same day. We do not think, however, that it was the purpose of the commissioners who revised the statutes and submitted their completed work in the form of the Consolidated Statutes of 1919 to the General Assembly, nor the intent of the General Assembly in enacting the Consolidated Statutes, to throw this work of investigation in agriculture back into the confusing state in which it was before the act of 1913. We interpret the law as it stands now as placing in the hands of the joint committee on agricultural work the supervision and control of all experimental agriculture in the State, and it gives that joint committee the power to determine and employ such workers as may be necessary for the conduct of the work, and regulate their salaries and duties.

We think, however, that C. S., sec. 4683, is still operative with reference to the sale and conveyance of test farms and use of proceeds. In coming to this conclusion, we have applied to the codification of 1919 the formal rule that where various statutes have been codified by the Legislature, it is permissible in their construction to inspect the original statutes and ascertain their meaning in the light of the statutes themselves and the history surrounding them. See *Mfg. Co. v. Andrews*, 165 N. C., 285. We are aided in coming to this conclusion from the fact that the appropriation made by the Federal Government under an act to provide for an increased annual appropriation for agricultural experiment stations and regulating the expenditure thereof, is to be expended by agricultural colleges within the State taking advantage of the act. U. S. Compiled Statutes of 1918, secs. 8878 to 8897a, inclusive.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COTTON WAREHOUSE ACT—ADMINISTRATION

July 17, 1924.

HON. WM. A. GRAHAM, *Commissioner of Agriculture, Raleigh, N. C.*

DEAR SIR:—We have considered carefully the papers left in this office this morning, and have also gone carefully over the Act of 1921, Chapter 137, of the Public Laws thereof, entitled "An act to provide improved marketing facilities for cotton," together with the United States warehouse act, Compiled Statutes of 1918, sec. 8747¾, et seq. Section 2 of the Act of 1921 is as follows:

The provisions of this act shall be administered by the State Board of Agriculture, through a suitable person to be selected by said board, and known as the State Warehouse Superintendent. In administering the provisions of this act the Board of Agriculture is empowered to make and enforce such rules and regulations as may be necessary to make effective the purposes and provisions of this act, and to fix and prescribe reasonable charges for storing cotton in the local warehouses and publish the same from time to time as they may deem necessary.

The resolutions adopted by your Board acting under Chapter 137, are as follows;

Resolved, That the former action of the Warehouse Committee in recommending J. P. Brown for State Warehouse Commissioner is hereby approved and ratified as being effective from the date Mr. Brown assumed these duties, January 12, 1923.

2. That inasmuch as the State Warehouse Superintendent's office is a part of the Division of Markets, the Chief of the Division of Markets is recognized as the Chief Executive with especial responsibility in the matter of finances.

As we understand the question, it is, whether or not your Board had authority to adopt resolution 2 above. We think it confers too broad a power upon the Chief of the Division of Markets as the statute evidently contemplates that the State Warehouse Superintendent shall be the person to administer the act. Section 4 requires him to give bond in the sum of \$50,000 to the State of North Carolina to guarantee the faithful performance of his duties. The remainder of the act is largely taken up in defining those duties and in fixing his liability for their proper performance, as well as conferring upon him the necessary authority over his subordinates, and the instrumentalities to effectuate the purpose of the act.

There seems, however, to be in the act inadequate machinery to collect the sums loaned by the State in the erection of various warehouses throughout the State. This duty is not specifically imposed upon the State Warehouse Superintendent and it is certainly not imposed upon the State Treasurer. Therefore, we think that under section 2 quoted above, your Board would have ample authority to designate the Chief of the Division of Markets as the person representing the Board in the Collection of the outstanding indebtedness by the various warehouses of the State to the guarantee fund provided by the act. We do not think, however, that the Board has the authority to make the Chief of the Division of Markets the chief executive in the administration of the act itself.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE INSURANCE COMMISSIONER

FIDELITY BOND EXECUTED IN ANOTHER STATE

November 18, 1922.

HON. STACEY W. WADE, *Insurance Commissioner, Raleigh, N. C.*

DEAR SIR:—In yours of November 17th you state:

The Tobacco Growers Association, a North Carolina corporation but having a branch office in Richmond, has entered into contracts for redrying tobacco with a number of redryers, some of them being Virginia corporations and some North Carolina corporations, on all of whom they require a bond guaranteeing the proper redrying of the tobacco. The redryers located in North Carolina have plants only in North Carolina while the redryers located in Virginia have redrying plants in Virginia, North and South Carolina, Tennessee and Kentucky. A blanket bond is issued on these corporations covering their operations in different states, which bond is sold by Virginia insurance agents and not countersigned in this State nor is any part of the commissions paid to a North Carolina agent.

You ask upon this the opinion of this office as to the effect that section 6287 and section 6302 (C. S.) have upon this condition.

We assume that the Tobacco Growers Association had legal authority to establish a branch in Richmond, Va. That the applications for this indemnity insurance were made at this branch office to agents located at Richmond, that a blanket bond is issued by the company securing the fidelity of all the redryers in whatever state such redryers may have their place of business; that the application for these bonds is made at Richmond and they are subject to approval by the Richmond branch. Under these conditions, though some of the redrying plants may be situated in North Carolina, we are of the opinion that neither section 6287 nor section 6302 of the Consolidated Statutes applies. Section 6287 may, however, apply to this extent: that if hereafter suit is brought upon the bond of the redryer located in North Carolina by the Tobacco Growers Association, which is a domestic corporation, the liability upon such bond would be determined by the law of North Carolina. We think Section 6302 of the Consolidated Statutes does not apply, because in the opinion of this office the business above described is not done in this State.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FIREMEN'S RELIEF

July 24, 1923.

HON. STACEY W. WADE, *Insurance Commissioner, Raleigh, N. C.*

DEAR SIR:—On July 25, 1919, in an opinion to your predecessor in office, Hon. J. R. Young, we discussed at large the Firemen's Reserve Fund Act. You will find this opinion in the 1918-1920 report of the Attorney-General, page 130. It seems from the letter of Mr. J. H. Wood, President of the N. C. State Firemen's Association, to you that the association is finding difficulty in inducing the various fire departments in the State of North Carolina to send representatives to the meetings of that association. Upon this you ask the opinion of this office as to whether or not the association may make participation of these fire departments in the Firemen's Relief Fund dependent upon their representation at the meetings of the association. This involves an interpretation of C. S., sec. 6072, which so far as material is as follows:

For the purpose of supervision and as a guarantee that provisions of this article shall be honestly administered in a business like manner, it is provided that every department enjoying the benefits of this law shall be a member of the North Carolina State Firemen's Association, and comply with its constitution and by-laws.

We think that this does not authorize the State Firemen's Association to penalize fire departments enjoying the benefits of the Firemen's Relief Fund under the act, by withdrawing these benefits because the particular fire departments are not represented at the annual meetings. If the General Assembly had intended this, no doubt it would have incorporated in the act a specific provision to this effect. The State Firemen's Association, however, has the right to make its constitution and by-laws and provide penalties for failure to obey them. This is acting in a legal way in its corporate capacity. It may, therefore, deprive these departments not participating in the annual meetings of the benefits arising from membership in the Association, which benefits are provided by the constitution and by-laws and not by the Firemen's Relief Fund act.

We return herewith the file of papers left with us yesterday.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INSURANCE COMPANIES—LOANS

August 18, 1923.

HON. STACY W. WADE, *Insurance Commissioner, Raleigh, N. C.*

ATTENTION OF MR. A. L. FLETCHER.

IN RE: *Loans made by domestic insurance companies.*

DEAR SIR:—In reply to yours of August 18.

We think that Section 6334 of the Consolidated Statutes was intended to regulate only the investment of capital of such companies. The Insurance

Commissioner, however, by section 6523 is given the power of visitation and examination of the affairs of any domestic society. Section 6340 authorizes the Insurance Commissioner to exercise the visitorial powers conferred upon him by investigating the character of *any loan* made by such companies. The latter section describes the loans which can be made, and this applies as well to loans from surplus as from capital stock.

We think it clear, therefore, that your Department has authority to compel a domestic company to take security for loans of a greater dignity and greater financial standing than personal security. Section 6340 declares that all collateral security for the payment of any loan which has not a cash market value of at least 25 per cent more than the amount of such loan is an illegal loan.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE COMMISSIONER OF REVENUE

INCOME TAX—NONRESIDENT CORPORATION AND INDIVIDUAL

July 7, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

1. IN RE: *Income tax Export Leaf Tobacco Company.*

DEAR SIR:—We have considered carefully the letter of Mr. W. R. Perkins, of New York. It must be remembered that the intention of the Income Tax Act is to tax all incomes earned in North Carolina. If there has been on the part of the Legislature a deliberate and express purpose to exempt certain incomes earned in this State from taxation when such exemption was not based upon any reasonable grounds, the act itself would be unconstitutional. The Constitution requires uniformity here as in other instances. To hold, therefore, that the income earned by the Export Leaf Tobacco Company in North Carolina is not taxed under the existing statute would be to impute to the Legislature a purpose which does not appear upon the face of the act. The definition of gross income contained in section 301 includes gains and profits derived from personal service of whatever kind and in whatever form paid. Section 300 declares that the words net income mean the gross income of a taxpayer less the deductions allowed by this act. The act itself passed in pursuance of constitutional authority contained in Section 3 of Article 5 of the Constitution purports to and does tax all net incomes so defined. In case of a foreign corporation then, such as is the Export Leaf Tobacco Company, the net income for the purpose of taxation is to be determined by the rule set out in section 301. It may be that if the second clause of that section stood alone, separate and distinct from the other provisions in the act, there would be some force in Mr. Perkins's suggestion. Construed, however, with the rest of the act, which is the proper method of construction, it seems clear that the Export Leaf Tobacco Company is taxable upon its net income earned in the State of North Carolina, though such income is not derived from a sale by it of tangible personal property in the State but from commissions for the purchase of such tangible property.

2. IN RE: *Official Atlantic Coast Line Railroad Company, whose headquarters are in Wilmington.*

It seems that this gentleman is a resident of the State of Georgia, whose employment sometimes carries him out of the State and he travels in six states. His headquarters, however, are in this State and his salary is paid him in the State. Section 200 of the act, assuming that this gentleman is a nonresident, taxes his income earned in the State because the business from which the income is derived, i.e., his employment is within the State. If he travels without the State, this it seems to us, is a mere incident to his

employment within the State and not a separate and distinct employment out of the State, and consequently, his income is taxable here.

3. IN RE: *American Bible Society.*

The affect of this transaction is, we think, to vest the Bible Society or Board of Missions with the complete ownership of the \$1,000.00, leaving to the donor his rights under the contract by which he is to receive 5 per cent annually upon said amount so long as he should live. We think this 5 per cent so received annually would constitute part of the gross income of the donor for income taxation. We do not think that the donor has any property subject to an advalorem tax except as the 5 per cent is paid annually and becomes mingled after such payment with his other taxable property.

We return herewith the papers in the three cases.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—TRADING STAMPS

August 9, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—It seems that the Sperry & Hutchinson Company deals in trading stamps, with its supply office in Baltimore. During May of this year, this company secured a license from the State, under Section 75 of the Revenue Act, to engage in the business at Wilmington, N. C., paying \$200.00 for the same. An agent of this company recently went to Southport to induce a merchant located there to adopt their trading stamp system, and the Sheriff of Brunswick County demanded another \$200.00 for the State and \$100.00 for the county. If this agent was traveling out from the Wilmington office, and the trading stamps were to be delivered to the merchant by mail, or express, or freight, we think the sheriff was wrong in his contention. What is taxed is "engaging in the business of issuing, selling, or delivering" trading stamps. What occurred in Southport was a mere treaty for a sale, for the term "sell" in its application to personal property includes in it delivery, without which, actual or constructive, there is no sale. If the trading stamps, then, are shipped from Wilmington, upon an open bill of lading, by common carrier, both sale and delivery are at Wilmington. For engaging in this business the company has already paid the State the license tax of \$200.00.

If, however, the agent was traveling out from Baltimore, with the trading stamps to be shipped from that point to the merchant at Southport, the act was clearly in interstate commerce, and neither the State nor the county could tax it, without such tax being a direct burden on such commerce section 75 appearing to be a revenue, and not in main design a regulatory, measure.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—GIFT ENTERPRISE

August 21, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

IN RE: *The Sperry & Hutchinson Company.*

DEAR SIR:—We have read Mr. Frank T. Wolcott's letter and the opinion of the Montana Supreme Court contained therein, 179 Pac., 457, and see no reason to modify our former ruling upon such dealing in trading stamps. It appears in the particular case that the premiums given by the Southport merchant are not redeemable in cash but in merchandise which is to be shipped from Chicago to the customers of the Southport merchant. The Montana Supreme Court bases its whole opinion upon the fact which appears distinctly in that case that the premium was in reality a cash discount upon cash purchases by the customers of the local merchants. This, of course, makes the scheme similar to that which is used in the National Cash Register system, the cash discount, it is true, in the latter instance being more immediate. Where, however, the local merchant uses these trading stamps and presents them to his purchasers with the stamps to be redeemed in merchandise, the transaction, it seems to us, comes plainly within the alternative designated of section 51 of the Revenue Act: "Any person or establishment offering any articles for sale and proposing to present purchasers with any gift or prize as an inducement to purchase . . ."

We return herewith Mr. Wolcott's letter and the Montana case.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INCOME TAX—DEDUCTIONS

August 23, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—Section 306 of the Revenue Act of 1921 allows certain deductions in computing net income. Among other deductions are debts ascertained to be worthless and charged off within the income year, if the amount has previously been included in gross income in a return under this act (sub-section 7). A debt was incurred to the income tax payer during the year 1920. This debt was charged off as worthless in December, 1921. You ask whether or not this constitutes a proper deduction from the income of 1921 under sub-section 7. We think it is not a proper deduction from the income of 1921, but will be a proper deduction from the income of 1922. The right to deduct the same is expressly qualified by the provision that it must have been previously included in gross income in a return under this act. It is manifest that the circumstances above detailed do not bring this debt within the qualification.

Sub-section 8 also allows a deduction in a reasonable amount for the depreciation and obsolescence of property used in the trade or business. The basis of this deduction is declared to be the cost of the property, but if the

property was acquired prior to January 1, 1921, its fair market value on that date shall be taken in lieu of its actual cost. The term "fair market value" used in the statute cannot be defined rigidly or even so comprehensively as to include all elements of value. Value itself is always relative. What an article of property may be worth at one time is no absolute standard of its value at a subsequent period, when conditions have changed. The General Assembly, recognizing this difficulty of definition, permits the Revenue Commissioner to make rules and regulations by which allowance under sub-section 8 shall be made. By doing this, it has placed the question of value largely within the sound and legal discretion of the Commissioner of Revenue. In this point of view we, of course, cannot and should not express an opinion upon what should constitute elements of value in a particular case, and we are utterly incapable of laying down a general rule before hand which would fit all imaginable cases.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE PRIMARY—VACANCY

August 28, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. Slaughter to you and find that the State-wide primary act does not deal with the situation arising in the Thirty-third District. Section 6053 of the Consolidated Statutes provides for filling vacancies when a candidate nominated in the primary dies, resigns, or for any reason becomes ineligible. There was an amendment to this section in 1917 which provided for nominating a candidate for an office when the incumbent of that office died after the primary, with his term unexpired.

These are the only provisions in the statute which deal with vacancies where the situation is such as it is in the Thirty-third District; under the general party rules, the executive committee of that senatorial district can convene and nominate a candidate if they choose to do so. That candidate's name, however, cannot be placed upon the official ticket which is to be printed by the State Board of Elections. The executive committee will have to arrange, if they nominate a candidate, for the printing of his tickets and see to their distribution.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—FRANCHISE—INTERSTATE COMMERCE

October 25, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

IN RE: *Franchise Tax of Swift & Co.*

DEAR SIR:—The Revenue Act imposes a franchise tax of 1-10 of 1 per cent on the amount subscribed or issued and outstanding capital stock of each

domestic corporation. It applies the same rule to foreign corporations with the exception that the franchise tax is 1-10 of 1 per cent of the proportion subscribed or issued and outstanding capital stock of a foreign corporation represented by its property or business in this State. It is evident, we think, and in legal effect, that the tax on domestic corporations is levied in the same manner as that for foreign corporations, and vice versa. Swift & Company, as we understand it, claims that in its report it included in its business carried on in this State shipments from its Charlotte office to points out of the State, and claim that if this is included in its business done in the State, the tax would be a burden upon interstate commerce. It is however, only incidentally a burden upon interstate commerce and not a direct burden such as was the statute in *Crew-Levieck Co. v. Pa.*, 245 U. S. 292. The term "business in the State" necessarily includes all of the business done by the company in this State. There is no direct tax levied upon this business in any point of view. It is simply used as a measure to ascertain what proportion of the capital stock of this company should be assigned to North Carolina for franchise tax purposes. This being true, neither the method of levying the tax nor the statute itself is obnoxious to the Federal Constitution.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—ITINERANT MERCHANT

December 22, 1922.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—It seems that A sometime ago came to Louisburg in Franklin County, rented a vacant store there for a period of six months with the privilege of renewal for the term of a year, and there engaged in the business of selling goods which he had purchased from the United States government in disposing of its camp supplies. You inquire whether or not A is liable for the peddler's tax imposed in Section 44 of the Revenue Act.

It is very clear that A is not a peddler within the ordinary definition of the term. Section 44, however declares that "each person other than a bona fide citizen of the county in which he shall undertake to do business, who shall expose for sale goods, wares or merchandise in any building, room or stand rented for such purpose, shall be liable to the tax herein imposed upon itinerant dealers." If, however, he continues to do business in the county for a period of one year, such tax shall be refunded to such dealer.

We interpret the terms used in the statute "bona fide citizen of the county" as meaning the person so described must have taken up his residence in the place with the intention of permanently remaining there. It is not a mere temporary residence but includes not only this, but the intention to make that a permanent home. Whether or not A comes within the definition is a question to be determined by the local authorities upon an investigation of the facts. If he is not a citizen of the county within this

definition, then he would be liable for the tax imposed by Section 44, but if he remains in Louisburg for a period of one year, conducting this business, the tax so collected is to be refunded to him.

You will perceive that it is largely a question of administration of the law by the local authorities after an investigation to determine the legal status of A. We think that if he pays this tax, he cannot be compelled to pay the tax imposed on second-hand clothing dealers in Section 34a of the Revenue Act. It might be safer, then, under the circumstances to collect from A the \$40.00 of section 34a, rather than the larger sum under section 44, if upon investigation the authorities find that he in good faith intends to remain in Louisburg for a period of twelve months.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—GIFT ENTERPRISE—LOTTERY

January 3, 1923.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—You inquire of this office whether or not the persons and firms in Sanford who engage in the advertising scheme hereinafter described are liable for the tax imposed on gift enterprises by Section 51 of the Revenue Act.

It seems that the business men of Sanford organized what is called the "Sanford Boosters Club," a scheme devised by that club in order to induce the payment of accounts and the purchase of goods by customers was as follows:

"Beginning Friday, September 28th, and continuing through Friday, December 22d, with every cash purchase of \$1.00, or \$1.00 paid on account, a numbered ticket will be given and the holders of lucky numbers will be awarded the prizes. The first ticket drawn will be given the first prize, the second ticket gets the second prize, and so on until the sixteen prizes have been awarded." All the prizes were money prizes and the lucky holders of the tickets were to be determined at a drawing at the town hall in Sanford Saturday morning, December 23d, at 10 o'clock. Each ticket, was, of course, numbered, and a duplicate number was to be placed in a barrel from which the tickets were drawn. The first prize was \$300.00; the second prize, \$100.00; the third fourth, fifth, and sixth prizes \$25.00 each; the seventh to sixteenth prizes, \$10.00.

Section 51 of the Revenue Act declares: "On any gift enterprise or any person or establishment offering any article for sale and proposing to present purchasers with any gift or prize as an inducement to purchase, \$25.00." The section concludes thus: "The taxes in this section shall be paid to the sheriff or tax collector of the county, but shall not be construed as giving license or relieving such person or establishment from any penalties incurred by violation of the law."

The Legislature in enacting this section seemed to contemplate that there might be a gift enterprise taxed by it which at the same time was an offense against the criminal laws of the State. That such enterprise is such offense, then, does not prevent a levy of the \$25.00 tax upon all firms, corporations or persons insuing the numbered cards which entitled each holder to participate in the drawing thereafter to be held to determine to whom the prizes should be given. We think it quite clear that this scheme makes each one of the merchants or dealers engaged in it and using it, taxable \$25.00 under Section 51 of the Revenue Act. Further, it is very clear, we think, that this scheme is a lottery as defined by the statutes of the State and the decisions of the Supreme Court. Consequently, all those taking part in the conduct of this drawing are guilty of a criminal offense against the laws of the State.

We return herewith the letter of Mr. W. C. Hammond and the circular of the Boosters Club.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

DRAINAGE ASSESSMENTS—COLLECTION

January 24, 1923

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

IN RE: *Collection of drainage assessments.*

DEAR SIR:—In reply to yours of January 3d.

The parties who own the realty in the drainage district in Hyde County are wrong in their contention that the sheriff must resort to personalty before he can sell the land subject to drainage assessments, in case those drainage assessments are not paid when due. These assessments are made a specific lien upon the land, and the sheriff is required to resort to the land in the first instance if they are not paid upon demand. The first time the General Assembly of North Carolina permitted a resort to personal property if for any reason the assessments could not be collected out of the lands, was in 1919. C. S., 5362.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX—INTEREST IN ESTATE

January 25, 1923.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MISS META ADAMS.

IN RE: *Inheritance tax upon the estate of Alexander Cooper.*

DEAR SIR:—It seems that Mr. D. Y. Cooper died on the 20th day of December, 1920, and Mr. Alexander Cooper died on the 21st day of May, 1922, before the estate of his father, Mr. D. Y. Cooper, had been finally settled. Mr. Alexander Cooper's interest in the estate of his father was one-fifth of the

residue of such estate upon its final settlement. Mr. Alexander Cooper left a last will and testament in which he devised all his property of every kind and description in a way not material to this discussion.

The personal representatives of Mr. D. Y. Cooper had settled the inheritance taxes upon his estate. The contention here is that as Mr. D. Y. Cooper's estate had not been settled, that Mr. Alexander Cooper's interest in the estate had not vested, and that consequently, the legatees and devisees under his will take his interest directly from the estate of D. Y. Cooper.

We have examined the brief of Messrs. Perry & Kittrell, attorneys for the executors of Alexander Cooper, upon this point, and with due respect to their opinion therein expressed, we think it clear that Mr. Alexander Cooper had a vested interest in the estate of his father at the time of his (Alexander Cooper's) death, which would pass by assignment *inter vivos* and so pass by his will to his legatees and devisees and that, consequently, the estate of Alexander Cooper is liable for the inheritance tax to be levied upon the transfers by his will as provided in the statute, notwithstanding the fact that the personal representatives of Mr. D. Y. Cooper had paid the inheritance tax upon his estate.

We return the file of papers left with us.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—FRANCHISE—INTERSTATE COMMERCE

January 26, 1923.

HON. A. D. WATTS, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—I have again gone carefully over the argument made by Messrs. Albert H. and Henry Veeder in regard to the franchise tax of Swift & Company in North Carolina. After this careful consideration and much thought upon the subject, I see no sufficient reason to modify the conclusion expressed in our letter to you dated October 25, 1922. It is not always possible to run the line clearly and distinctly between what State taxation is a burden upon interstate commerce and what is not, as the decisions which have dealt with this question heretofore are not directly in point. So true is this that nearly every case must stand or fall upon its own facts.

In the opinion of this office, the section of the Revenue Act imposing a franchise tax upon foreign corporations is upon its face clearly constitutional. In the administration of the law and in arriving at the proportion of the capital stock of the company which is devoted to the business of the company in this State, we think you may take into consideration the business done by it in this State in filling orders in the State for customers out of the State. That is business done in the State and under protection of the laws of the State. If such administration of the law affects interstate commerce, such effect is not direct, but consequential, the business arising from the filling of orders in the State for extra-state customers being used

only as a means of measuring the proportion of capital stock devoted to business in this State.

We return herewith the file in this case.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—REAL ESTATE AGENTS

April 9, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—We have considered letter of Mr. A. M. McDonald to you. It asks an interpretation by the Attorney General's office of Section 30 of the Revenue Act. That section imposes a license tax upon real estate and rent collecting agents. It is remarkable in that it does not permit a license to be issued to a corporation, but requires the individuals carrying on the business of the corporation to be licensed themselves. Its terms are:

Every individual or firm or his or their agents acting as agent in buying and selling real estate of any and every description, or collecting rent for compensation, shall pay an annual license tax," etc.

The fact that the section does not deal with corporations, we think, indicates that only the individuals acting for the corporation, for which it is formed to do a real estate brokers and rent collecting business, can be licensed. It is remarkable also that it not only requires the individual or firm to be licensed, but also the agents of the individual and the agents of the firm. This seems to intend that every person actively engaged in the business of buying and selling real estate or in collecting rent for compensation shall be licensed. This, however, would not include mere servants and employees of a real estate agent or firm, but only those who in the act itself engage in buying and selling real estate. For instance, an employee in and about the office would not be required to be licensed, but an agent of the office sent out to buy or sell real estate for the office would be required to take out a license.

This interpretation of the act is not entirely satisfactory, but it is the only one that occurs to us which apparently, at least, effectuates the intention of the Legislature in enacting it.

We return Mr. McDonald's letter herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—FARM PRODUCTS—COÖPERATIVE ASSOCIATION

April 14, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—You left with this office for reply, letter of Mr. John A. Weddell, County Supervisor of Edgecombe County, dated April 10th, in which

Mr. Weddell asked how cotton, tobacco or peanuts that are held by co-operative associations are to be listed for taxation. We think it quite clear that the coöperative association is to list such cotton, tobacco and peanuts for taxation and after the payment of the taxes, such taxes will be an expense to be charged against the individual holders of receipts from such association in settlement with these individual holders.

Sections 33 and 40 of the Machinery Act deal with the listing of farm products while owned by the raiser or producer. Section 33 requires such farm products thus owned to be listed where raised. Section 40 gives to the value of cotton, tobacco or other farm products in the hands of the original producers the significance of a solvent credit and the owner may deduct from such value the amount of collectible debts owing by him as principal debtor. The Legislature has thus dealt specially with such property, but has limited such dealing to that property when in the hands of the raiser or producer.

It is manifest, we think, that these provisions do not apply to the situation created by the placing of cotton, tobacco or peanuts in the hands of these co-operative associations. The legal title of all such property has passed from the original producer to the coöperative association. That association for all purposes connected with the sale of the property, is the owner of that property. In dealing with it, it grades and classifies it and mingles the farm products with the other farm products of the same grade and class and sells them as a whole. That the association is to account to the producer for the value of such farm products after the sale of the same and after deducting the expenses of the sale, cannot, we think, as the statute is now written at all change the situation as to who shall list and who shall pay the taxes upon this property.

We return herewith Mr. Weddell's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX—ADOPTED CHILD

April 19, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MISS META ADAMS.

DEAR SIR:—We have considered the question presented by Mr. W. C. Hammond in his letter to you. The case may be stated thus:

Robert Sanders at the age of seven years was taken by his uncle C. T. Luck, into his family. Sanders resided with Mr. Luck until his (Sanders) death, occupying to him a mutually acknowledged relation of a child. After Sanders had arrived at the age of fifteen years, his uncle, Luck, married the second time and has two children who are first cousins to Sanders. Sanders died, devising his property to Luck, Luck's wife and two children. Upon this you ask what rate of inheritance tax should be imposed upon the interest of Mrs. Luck and her two children under this will.

We find upon investigation that the inheritance tax law was materially modified in this regard by the General Assembly of 1921. In 1919, when dealing with the rate of tax, the provision was:

Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, adopted child, or husband or wife, of the person who died possessed of such property aforesaid, at the following rates of tax, etc.

This office ruled that the term "adopted child" should be construed as a child legally adopted. The General Assembly of 1921 added the following to the section as written in the act of 1919:

Or any person to whom the decedent stood in the mutually acknowledged relation of the parent, and who began such relationship at or before such person's fifteenth birthday, and whose relationship was continuous from such age until the date of the decedent's death.

It is obvious from this that Mr. Luck came within the designation of the act of 1921. Consequently, as to his interest in the devise of Sanders, the rate of tax shall be 1 per cent. There is nothing, however in the statute which extends this lower rate to Mrs. Luck or the children of Luck. Consequently the rate of taxation upon their interests in this devise from Sanders will be fixed by their actual (not putative) relationship to the deceased Sanders.

We return herewith Mr. Hammonds letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—COOPERATIVE CERTIFICATES—SOLVENT CREDITS

April 20, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—The reason upon which the former opinion was based, that the coöperative association should list the cotton and tobacco taken over by it under its contracts with the producers, would prevent the taxability of the certificates held by these producers. They may be called certificates, but they are, after all, mere contracts between the association and themselves, and as such, we think they are not solvent credits within the meaning of the revenue acts.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX— A. C. L. STOCK

May 22, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MISS META ADAMS.

DEAR SIR:—The question propounded by you to this office upon the inheritance tax law of 1923 is very difficult of solution. We will state the question in this way:

A nonresident decedent owns stock in the Atlantic Coast Line Railroad Company of Virginia, the stock being out of the State at the time of his death and it passing to a nonresident distributee or legatee. Is this transfer of stock subject to the inheritance tax law of 1923 in North Carolina?

It is very clear, we think, that the Atlantic Coast Line of Virginia is a domestic corporation in North Carolina. Section 2 of Chapter 77, Laws of 1899, reads as follows:

Sec. 2. That the Atlantic Coast Line Railroad Company of Virginia, a corporation created by and existing under the laws of the State of Virginia, is hereby created a body politic and corporate in the State of North Carolina under and by the aforesaid name of the Atlantic Coast Line Railroad Company of Virginia, and by such name may sue and be sued, may adopt a common seal and change the same at will, and have all the general powers and be subject to all the general restrictions granted and imposed by the laws of this State to and upon railroad companies.

Section 4 reads as follows:

Sec. 4. The powers given by this act to the Atlantic Coast Line Railroad Company of Virginia are granted upon the express condition that the property of the said Atlantic Coast Line Railroad Company of Virginia in this State shall always be liable to taxation under the Constitution and laws of this State, and that said company shall be subject to the tariffs, rules and regulations prescribed by the Board of Railroad Commissioners.

This act of 1899 was the completion of a plan by which the Atlantic Coast Line of Virginia entered North Carolina and took over existing railroad corporations in the State. See Chapter 294, Private Laws of 1893 and Chapter 105, Private Laws of 1899.

The Supreme Court of North Carolina has declared that the Atlantic Coast Line Railroad of Virginia is a domestic corporation of the State of North Carolina. *Staton v. Railroad*, 144 N. C., 145; *Railroad Co. v. Spencer*, 166 N. C. 522; and *Cox v. Railroad*, 166 N. C., 652. It is true that the same Court held that for the purpose of exemption from taxation of shares of stock in this corporation such shares were not protected by the exemption clause of the revenue act of 1919. This clause exempted shares of stock in domestic corporations where the corporation itself had paid the taxes thereupon in accordance with machinery provided in the act. It further held that the

exemption of shares of stock in foreign corporations having two-thirds of its property in North Carolina did not apply to the Atlantic Coast Line Railroad of Virginia. So, we can safely deal with the Atlantic Coast Line Railroad Company of Virginia as a domestic corporation, to enable us to determine whether its shares of stock passing by will or intestacy are liable to the inheritance tax under the act of 1923. In addition, however, to the State authorities, we have examined the following cases in the United States Supreme Court: *Indianapolis & St. Louis R. R. Co. v. Lance*, 96 U. S., 450; *Memphis & Charleston R. R. Co. v. Ala.*, 107 U. S., 581; *Clark v. Bernard*, 108 U. S., 436; *Stone v. Farmers Loan & Trust Co.*, 116 U. S., 307; *Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S., 161; *Gerling v. Balto. & Ohio R. R. Co.*, 151 U. S., 673. These all hold definitely that a railroad company incorporated as the Atlantic Coast Line Railroad Company of Virginia was incorporated in North Carolina, is a corporation of the latter State.

The inheritance tax law of 1923 was materially changed in such way as to make the solution of the question presented in this case much more doubtful. The seventh sub-division of section 6 of the act of 1923, which is as follows, seems, however, to intend to levy an inheritance tax upon shares of stock situated in relation to the State as are those in the instant case:

Seventh. The words "such property or any part thereof or interest therein within this State," wherever appearing in this act, shall include in its meaning bonds and shares of stock in any incorporated company incorporated in this State, regardless of whether or not any such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds or shares of stock in any such incorporated company owning property and doing business outside of this State shall be paid before waivers are issued for the transfer of such bonds or shares of stock as hereinabove provided for.

The words "estate" and "property" wherever used in this act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee, or vendee, not exempt under the provisions of this act, whether such property be situated within or without this State. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession, or enjoyment, present or future, by distribution, by statute, descent, devise, bequest, grant, deed, bargain, sale, or gift.

Any incorporated company not incorporated in this State and owning property in this State which shall transfer on its books the bonds or shares of stock of any decedent holder of shares of stock in such company exceeding in par value two hundred dollars before the inheritance tax, if any, has been paid, shall become liable for the payment of the said tax, and any property held by such company in this State shall be subject to execution to satisfy same. A receipt or waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock or bonds.

The rule upon which such tax is to be computed is provided in sections 13, 13a, and 14 of the act of 1923. On the whole, then, we think that such shares of stock are taxable under the inheritance laws of the State of North Carolina in proportion to the property of the Atlantic Coast Line Railroad Company of Virginia in North Carolina, to its property elsewhere. To hold otherwise would be in effect to say that the shares of stock issued by the Atlantic Coast Line Railroad Company of Virginia were based upon the value of property to be found only in Virginia.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PEDDLERS—ACT OF 1923

May 23, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. J. R. COLLIE.

IN RE: *License Tax of Peddlers.*

DEAR SIR:—The section which imposes a license tax upon peddlers in section 44 under the former Revenue Act. It is section 45 in the Revenue Act of 1923. The Revenue Act of 1923 in this section made certain alterations in the law as it had previously existed, and you inquire of this office what is the effect of these alterations.

The principal change was to transfer the administration of the act from the board of county commissioners of the various counties to the Commissioner of Revenue. Every person proposing to do the business defined in section 45 is required to apply in advance for license to the Commissioner of Revenue for each county in which he proposes to peddle or sell. Upon such application the Commissioner of Revenue is required to issue the license upon the payment of the tax. It is manifest from this that the Commissioner of Revenue has no discretion in the issuing of the license. The old law which required the application to be made to the board of county commissioners of the particular county in which the peddling was to be done, allowed the board of commissioners a discretion in issuing the license upon the payment of the tax to the sheriff. The elimination entirely of any discretion in the issuing of the license to peddlers converts the section into a revenue measure, pure and simple, eliminating therefrom the feature which was in itself an exercise of the police power of the State.

When, therefore, the Commissioner of Revenue issues a license to a person to peddle in particular counties, that license authorizes the person to pursue the business of peddling in the county, but it does not avoid the necessity for an application to the board of county commissioners for a county license also.

Section 101 of the Revenue Act declares that in cases where a specific license tax is levied for the privilege of carrying on any business, trade or profession, the county may levy the same tax and no more, provided no provision to the contrary is made in the section levying the specific license tax. Now, in section 45 there is no provision to the contrary. Consequently,

the county can collect from peddlers peddling in the county a license no greater than that levied by the State. If, however, the Commissioner of Revenue has licensed the peddler to do business in a particular county, we think the authority of the board of county commissioners extends no farther than to levy a similar tax for county purposes upon the man so licensed by the Commissioner of Revenue. It has no authority to disregard this license of the Commissioner of Revenue and refuse to license the peddler at all, unless the Legislature in some special or local act has conferred this authority specifically upon it.

Section 45 retains the provision requiring the board of county commissioners to exempt Confederate soldiers and veterans of the Spanish American War, but such boards shall notify the Commissioner of Revenue of the exemptions. The Commissioner of Revenue thereupon issues a license to the Confederate soldier or Spanish War veteran which is to be good in every county in the State. We suggest that you adopt form of license for such veterans.

We suggest also that when you license a proposed peddler under section 45, that you notify the boards of county commissioners of the counties in which he is authorized to do business of that fact, in order that such boards may be advised to what persons they are required to issue county licenses.

Without elaborating this opinion further, we think that the above is the proper construction of the new section 45 in the particulars treated.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PEDDLERS—COUNTIES

May 25, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

IN RE: *Peddler's Tax under Section 45.*

DEAR SIR:—You ask of this office a more definite ruling as to whether or not boards of county commissioners of the various counties have under sections 45 and 101 of the Revenue Act any discretion as to licensing in their counties a particular peddler who had been licensed by you, to sell in a particular county or counties. We think it quite clear that such boards have not a discretion which permits them to refuse to license a peddler so licensed by you. As said in a former letter, the General Assembly of North Carolina in 1923 struck out the provision in the section requiring license for peddlers which conferred upon the boards of county commissioners a discretion in licensing such peddlers. The necessary effect of that was to change the provision in such a way as to make it a revenue statute, pure and simple. The idea of regulating who should be peddlers by the board of county commissioners is thus eliminated.

Section 101, if you will observe the wording, is permissive to the county to levy a license tax upon those peddlers of not more than the amount levied by the State. When the proposed peddler, then, obtains a license from you to sell in a particular county, the next step in the transaction is for him to apply to the board of county commissioners of the county in which he is

licensed to do business by you and pay the tax to the county which they have theretofore levied. When the proposed peddler does this, he is entitled to his license and the board of county commissioners cannot refuse to license him upon the payment of the county tax. This, we think, is the proper construction of the act as amended.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—DUPLICATE LICENSE—SECTION 78.

June 14, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—Section 78 of the Revenue Act imposing a license tax upon manufacturers of automobiles in the part material to this ruling declares:

Every one to whom the \$500 license shall have been issued as provided in this section is authorized to employ an unlimited number of such agents to sell only the machine designated in the license, upon payment in each instance of the \$5 tax aforesaid.

You inquire upon this whether the section contemplates the issue of the single \$5 duplicate license to a corporation or whether this \$5 duplicate license shall be issued only to individuals selling the car. This section must be construed with Section 95 of the Revenue Act. That section in part provides:

No officer required to issue licenses under this act shall have authority to issue a duplicate of any license unless expressly authorized to do so by this chapter, but each person, firm or corporation shall be required to take out a separate license for each agent.

Construing these two sections together, we think that the duplicate license authorized by section 78 is a license to individuals and not to corporations, who may employ an indefinite number of agents.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—NATIONAL BANKS

May 31, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—You ask this office to advise you as to what is now a permissible method to tax the stock in national banks located in the State, and to tax the stock in joint stock land bank associations.

(1) *Stock in National Banks.*

Previous to March, 1923, Section 5219 of the Revised Statutes (Section 9784 of the Compiled Statutes of 1918) provided the method by which stock in national bank associations should be taxed. That section was as follows:

Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town, where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.

The recent Congress which expired by limitation on March 4th, however, enacted a law entitled "An Act to amend Section 5219 of the Revised Statutes of the United States," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 5219 of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

Sec. 5219. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said state of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of the net income as above provided of any national banking association owned by nonresidents of any state, or the dividends on such shares owned by such nonresidents shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.

Approved March 4, 1923.

You will observe from an inspection of the act that Congress permits the several states to tax shares of stock in such national banks at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state coming into competition with the business of national banks, provided that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business, and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of the particular section. If, however, the State adopts this plan of taxing shares in such national bank associations, it cannot tax the dividends derived from such shares by the individual shareholder as part of his income, nor can it collect from the association its net income tax, it being expressly declared in sub-section (a) of section 1 of the act: "The imposition by said state of any one of the above three forms of taxation shall be in lieu of the others." If the state adopts the first plan of taxing the stock of the national bank association, the method of levying the tax upon such stock is that provided in Section 35 of the Machinery Act of 1923. *First National Bank of Aberdeen v. Chehalis County*, 165 U. S., 440. The recent act of Congress does not at all interfere with the authority of the state to levy and collect the tax in manner and form as provided in section 35 supra.

It is noticeable that the recent act of Congress narrows the term "moneyed capital" as contained in the old section 5219, and declares that the term "moneyed capital" should not include mere personal investments not made in competition with the national bank business. This was probably done to meet the decision of the United States Supreme Court in the case of *Merchants National Bank of Richmond v. The City of Richmond*, 256 U. S., 635. In that case it was held that credits, money loaned out at interest, and demands against persons or corporations were moneyed capital within the meaning of section 5219. The effect, of course, of narrowing the meaning of the term in the statute is to exclude from the definition of moneyed capital these merely personal investments which had theretofore been held

to be moneyed capital, such as would limit the authority of the states to tax shares of national banks.

Stated shortly, then, the state has a right to tax shares in national banks in any one of three methods: (a) It may tax such shares according to the method provided in Section 35 of the Machinery Act; or (b) it may include the dividends from such shares received by the individual shareholder as income of such shareholder for the current year in which the tax is levied; or (c) it may tax the income of the association itself.

The adoption of any one of these methods of taxation excludes the other. If, therefore, you levy your tax upon the shares of stock under Section 35 of the Machinery Act, you cannot tax dividends from such shares in the hands of the individual shareholder as income, nor can you tax the income of the national bank itself.

(2) *Joint Stock Land Bank Associations.*

The solution of the question here is much more difficult, but after considering it from every aspect that occurs to us, we have come to the conclusion that such shares of stock can be taxed by the state in identically the same manner as that hereinbefore elaborated with reference to shares of stock in strictly national banking associations. Our reason for this conclusion may be stated shortly thus:

The method allowable to the state for taxing shares of stock in these joint stock land bank associations is thus stated in the act of Congress, Compiled Statutes of 1918, Section 9835q, sub-section 2:

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares in assessing tax imposed by authority of the state within which the bank is located; but such assessment and taxation shall be in a manner and subject to the conditions and limitations contained in Section 5219 of the Revised Statutes with reference to the shares of national banking associations.

It is obvious from this section that Congress intended to permit the taxation of these shares of stock as, and only as, shares of stock in national banking associations were allowed to be taxed. It accomplishes this purpose by reference to section 5219. The main intent of Congress, then, as expressed in the act, was to put them upon the same footing with reference to state taxation as shares of stock in national banks. It is true that the act of March, 1923, makes no allusion to shares of stock in joint stock land banks, but we think that the effect of that act in amending specifically section 5219 and substituting therefor a new section 5219, is to incorporate the subject matter of the amendment in the prior act at the time of its adoption, so far as regards any action had after the amendment was made. Thus, the main intent of Congress in the section permitting taxation of shares of stock in joint stock land banks being to put such authority to tax upon the same footing as the authority to tax shares of stock in national banks, we think that the amendment of 1923 refers as well to shares of stock in joint stock land banks as to shares of stock in national banking associations.

Of course, you understand that all three of the acts permit the taxation of the real property of national banks and joint stock land bank associations, just as the real property of any other citizen is taxed.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX—ADVANCEMENTS—ACT OF 1923

July 31, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MISS META ADAMS.

DEAR SIR:—There were material changes made in the inheritance tax law by the General Assembly of 1923. The change particularly applicable to the discussion is to be found in Section 6 of the Revenue Act, and subsection sixth of that section. The inheritance tax law in the act of 1923 began as it has always begun, with the following expression: "From and after the passage of this act," etc.

A decedent made advancements and gifts in excess of 3 per cent of his estate at the time the advancements were made and within three years of his death. These advancements were made before the ratification of the Revenue Act of 1923, but the decedent died July 7, 1923. You inquire upon this whether or not the inheritance tax provided in the act of 1923 shall be levied upon these advancements. We think the Legislature in the amendments to the act incorporated in 1923 intended that these advancements and gifts should be taxed. In sub-section sixth, describing the nature and character of the gifts which should be subject to inheritance tax, the value of such advancements is fixed at the time that they were made, and then it declares them to be subject to the inheritance tax herein prescribed *as of the date of the death of the decedent*. This was a plain declaration that these advancements and gifts should be taxed, but only as of the date of the death of the decedent. They must, of course, have been made also to the extent of 3 per cent of the decedent's estate within three years of that death. If the decedent had died before the ratification of the act, of course no inheritance tax could be levied, although the estate was settled afterwards. If he had outlived the three year period provided by the statute, then no inheritance tax could be levied upon these advancements.

The statute thus makes the point at which the inheritance tax accrues the death of the decedent. The case cited by Mr. Barnhart, *Schwab v. Doyle*, 258 U. S., 529, was decided upon a different statute from ours. There, the transfer might have been made at any time, it makes no difference how far back, if it was intended to take effect in possession or enjoyment at or after his death. There, the tax was levied upon the original transfer. There, the statute imposed the tax only upon the estates of those dying after the passage of the act. The U. S. Supreme Court construed, therefore, this statute as not applying to the gifts and transfers of a decedent made before the enactment of the law, though he died afterwards. In the opinion, however, the Court calls attention to the fact that the act was subsequently amended (1918) and taxed the transfer, whether made before or after the

passage of the act, and held that this act was valid and after its enactment the tax would be a proper one. Now, the North Carolina statute, differing in these material particulars from the Federal statute, in the opinion of this office does tax these advancements under the circumstances above stated.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PENALTIES—COUNTIES

September 29, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—We have considered the letter of Mr. R. G. Vaughn of Winston-Salem, N. C., to you and have come to the conclusion that the penalty levied under Section 96 of the Revenue Act is for the failure to pay the schedule B taxes to the State, and that the penalty is not to be divided between the State and the county. The Revenue Act is silent upon any penalty to be collected by the sheriff for the benefit of the county, and being so silent, we know no way by which the penalty could be imposed by the county.

The Attorney-General informs me that he has heretofore ruled that the penalties of the Revenue and Machinery Act are not such as by the Constitution are devoted to the school fund of the county in which the penalty was incurred. On the contrary, they go into the State Treasury as part of the fund raised by the act.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

CORPORATIONS—REPORTS

October 24 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

IN THE MATTER OF *reports of the John L. Roper Lumber Company and the Norfolk-Southern Land Company.*

DEAR SIR:—Our understanding of the Revenue Act, sections 89 et seq., is that until a foreign corporation withdraws formally from the State or until a domestic corporation has entered upon the process of dissolution, it is required to make the reports provided under the above sections.

We return herewith Col. Rodman's letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—DEALERS IN SECURITIES

October 20, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—Your letter of October 17th with attached papers, referring to the Auto Finance Corporation of Wilmington, N. C., is received. From

these papers it appears that this corporation, organized under the laws of the State, does the business of dealing in notes given for a part purchase of automobiles, these notes being secured by mortgages upon the automobiles and being bought from the dealers who sell automobiles on part time and part cash to their customers.

Section 55 of the Revenue Act of 1923 provides that every dealer in stocks, bonds and other securities, etc., shall be subject to a license tax, graduated according to the population of the city in which the business is conducted. If the papers attached correctly state the business in which the Auto Finance Corporation is engaged, then I think it is subject to the license tax under this section. It is a dealer in securities as a business.

I return herein the papers you enclosed in your letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PEDDLERS—TRUCK HAULING

October 27, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—You ask this office to interpret Section 45 of the Revenue Act with reference to parties who carry goods about the country in a truck and sell those goods from a truck without previous orders for the goods direct to purchasers, and after such sale, deliver the goods to the purchasers in original packages without breaking bulk. The question is directed only to such transactions wholly within the State. We think the section defines what shall be deemed a peddler thereunder in the following clauses:

Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same or actually sells or barter the same, shall be deemed a peddler.

Any person carrying a wagon, cart, buggy or motor driven vehicle or traveling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler.

These two extracts from section 45 we think answer fully your question. Under these extracts from said section, a peddler is one who carries goods about with him for the purpose of selling and delivering goods or offering to sell the same, without previous orders. The fact that the goods are sold and delivered in original packages or by wholesale does not affect in any way the character of the transaction under the statute where it is an intra-state transaction. It would be otherwise if a drummer or traveling agent of a manufacturer or dealer in a particular class of goods should travel around the country and solicit orders for these goods and thereafter, in pursuance of such orders, should deliver the goods through a truck. The method of transportation in the latter case would not affect the principle. It is clear that this would not be peddling.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX—POWERS OF APPOINTMENT

November 3, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*IN RE: *The Estate of Mrs. Theodosia H. Taylor.*

DEAR SIR:—It seems that Stanford L. Haynes of Springfield, Mass., died in 1920, leaving a will which contained the following provisions:

Fifth. All the rest, residue and remainder of all my goods and estate, both personal and real of every kind and description and wherever situated, I give, devise and bequeath to said Springfield Safe Deposit and Trust Company in trust to hold, manage, control, invest and reinvest in accordance with its best judgment and discretion as follows:

A. One-half of said rest, residue and remainder shall be set apart and kept in a separate trust fund for the benefit of my daughter, Theodosia Haynes, and the net income therefrom shall in quarterly installments be paid to my said daughter as long as she shall live. Upon the death of said Theodosia, I direct that the principal of said trust fund be paid and transferred to such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation.

It is manifest from this that if Mr. Haynes was a resident of North Carolina, the law which would apply to the inheritance tax upon his estate is the Revenue Act of 1919. That act contained no provision taxing the exercise of powers of appointment.

On June 23, 1921, Mrs. Taylor (nee Haynes) died a resident of North Carolina, leaving a will in which she exercised the power of appointment contained in her father's will by leaving all of said fund in trust with the Springfield Safe Deposit and Trust Company as trustee, the net income to be paid one-half to her husband and one-half to her child during their lives. Upon the death of the father, his share of the income is to go to the child, the child being given power of appointment at his death over the principal.

It is manifest that if an inheritance tax is to be levied upon the estate of Mrs. Theodosia H. Taylor, the law applicable is the act of 1921. That act is found in the concluding part of Section 6 of the Revenue Act of 1921. We do not copy that because it is immediately available for you. This provision of the Revenue Act of 1921 was taken from the New York Act of 1897, copied literally from the act.

It is manifest also under our decisions, that the power of appointment given Mrs. Taylor under the will of her father is a general power, as distinguished from a special power. It is also plain that Mrs. Taylor's will is an execution of that power. It is held in North Carolina that when these general powers of appointment are conferred upon a particular individual, the property appointed forms part of the assets of the appointer and is subject to the claims of his creditors in preference to the claims of the

appointee. *Rogers v. Hinton*, 62 N. C., 101; the same case, 63 N. C., p. 80; *Hicks v. Ward*, 107 N. C., 393. This being true, creates a distinction between this case and the case in Massachusetts, *Walker v. Mansfield*, 221 Mass., 600.

Now, in New York the Court of Appeals has dealt directly with the question involved in Mrs. Taylor's estate in a number of cases, more particularly *In Re, Dows*, 167 N. Y., 227, and *In Re, Delano*, 176 N. Y., 486. The Dows case is also found in 52 L. R. A., 433, while the Delano case is found in 64 L. R. A., p. 279. It is noticeable that in the particular case if Mrs. Taylor had died without exercising the power of appointment contained in her father's will, the whole of this property would have gone to her child, to the exclusion of her husband. Under the power, however, as exercised, the husband takes the net income upon one-half for his life.

The New York court in construing this statute, declares that it imposes a tax, not upon property, but upon the exercise of the power of appointment. In the Dows case it is said:

Whatever be the technical source of title of the grantee under the power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.

Again:

When the creator of the power granted the property to the appointees of his daughter, he necessarily subjected it to the charge that the state might impose on the privileges accorded to the daughter of making a will. That charge is the same in character as if it had been made on the inheritance of the estate of the daughter herself, that is, for the privilege of succeeding to property under a will.

In other words, it was necessary that this will should be executed in order that the appointors should have had any right of property in the trust fund, and as Mrs. Taylor was a resident of North Carolina, it was executed under the authority conferred by North Carolina to pass the property in this way.

In the Delano case it is said:

The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this case was exercised by will, in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn

as to all others. The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will.

Now, in both of these cases the original power of appointment was created long before the enactment of the inheritance tax law taxing the exercise of the powers of appointment, yet the Court held that this act so taxing it, though applicable to property theretofore conveyed, was taxable under the act of 1897, the power of appointment having been exercised after the enactment of the law. Both of these cases were affirmed on appeal to the United States Supreme Court, the Dows case under the name of *Orr v. Gilman*, 183 U. S., 278, and the last case in *Chandler v. Kelsey*, 205 U. S., 466. It was argued in these cases that an estate which arose from the exercise of the power, came from the donor of the power and not from the appointer, and so was vested long before the passage of the amendment of 1897, under the authority of which the tax was imposed, and to tax the exercise of the power, therefore, taxes property without due process of law. The Supreme Court in both cases expressly overruled this contention. Many cases are cited in the discussion which go to show that the Legislature had constitutional authority to tax the power of appointment as of the time of its execution, as much as it has authority to tax the transfer of property by will or deed.

In Minnesota the same rule applies:

Whatever be the technical source of title of grantee under power of appointment, in reality and substance it is the execution of the power that gives property to the grantee. *State v. Probate Court*, 124 Minn., 511.

These cases, then, determine that under a statute identical with the North Carolina statute, the inheritance tax is levied upon the transfer of property through the power of appointment, and it makes no difference how long before that power of appointment was conferred upon the appointer. Consequently, we submit that the Act of 1921 clearly under these decisions applies to Mrs. Taylor's estate, notwithstanding the fact that her power to appoint was derived from a will executed before the enactment of the law. This being true, it is, we think, clear that the transfer tax in the instant case is not a tax upon property located out of the State, but is in reality and substance a tax upon an act done by a resident of the State, domiciled in the State at the time of her death, which transfers property out of the State to residents of the State.

Judge Manning agrees, without committing himself, that in this point of view a serious doubt is created as to whether or not the Act of 1921 is applicable.

See also *In Re: Taylor's Estate*, 2 N. Y., Sup., p. 321.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

TAXATION—AUTOMOBILE DEALERS

November 9, 1923.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—we have considered the letter of the Ford Motor Company to your office. We do not understand how there can be any confusion about the duplicate license tax. The statute, Section 78 of the Revenue Act, is perfectly plain, it seems to us, upon that question. The State Commissioner of Revenue does not issue these duplicates of his own motion. The statute expressly requires a written application of any one who has obtained the \$500.00 license in order that a duplicate license shall be issued to his selected agent. The person who has paid the \$500.00 license may employ an unlimited number of agents and have these \$5.00 duplicate licenses issued to them upon written application made by him. No person has authority under the law to sell the particular machine licensed to be sold in the State except the dealer or manufacturer who takes out the \$500.00 license tax and his own selected and certified agents having duplicate licenses. Any and all persons attempting to sell this particular machine theretofore licensed (excluding second-hand dealers) without this authority, subjects himself to indictment and to the imposition of the penalty provided for doing business without obtaining the license required by the particular statute.

Why there should be any trouble about this, I do not see. They seem to hark back to the case of *Automotive Association v. Doughton*. The Court there was dealing only with the question set out in its restraining order. The first branch of Judge Harding's judgment on page 31 simply restrains you temporarily from demanding or collecting more than one license tax of \$500.00 for selling in this State the automobiles or trucks manufactured by a single manufacturer, then goes on and enjoins and restrains you from requiring a double duplicate license for the sale of the car and truck manufactured by the same manufacturer. The Supreme Court in the concluding part of the opinion, 186 N. C., p. —, says:

Section 95 of the statute provides: "No officer required to issue license under this act shall have authority to issue a duplicate of any license unless expressly authorized to do so by this chapter, but each person, firm or corporation shall be required to take out a separate license for each agent." According to the express terms of section 78, these agents who have duplicate licenses are authorized to sell only the car or truck of the factory in the duplicate license, and the commissioner of revenue is not authorized to issue duplicate license for the sale of more than one brand or make or trade-name of a car—i.e., it must be from the same manufacturer or factory.

and that simply reversed Judge Harding on his holding above set out and leaves you free to deal with the question presented in that case in accordance with the opinion of the Court.

Recapitulating, then, in order that the subject may be clarified even more, (1) The statute requires you to collect either from the manufacturer or from the dealers in such cars, \$500.00 for the privilege of selling that particular brand or make in the State of North Carolina; (2) It authorizes the dealer or manufacturer who pays this tax to appoint as many agents as he chooses to sell this particular brand or make for which he himself holds the \$500.00 license; (3) These agents are not selected by you but by the licensee under the \$500.00 license. They can do business as the agents of this licensee only after the licensee makes a written application to you and pays for each one of them \$5.00, whereupon you issue a duplicate license to these subordinate agents thus selected; (4) If anyone not having this duplicate license or not being the licensee under the \$500.00 license, attempts to sell a particular machine without having the duplicate license, he would subject himself to indictment for doing business without a license and to the penalty provided by the act; (5) We do not interpret the act as requiring the licensee under the \$500.00 license to take out the \$5.00 license for those of his employees who are acting and working within the place in which the \$500.00 license is to be kept.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—DEALERS IN GASOLINE

December 14, 1923.

MR. E. C. BEDDINGFIELD, *Office of Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—You requested a ruling from this office as to whether or not Section 60 of the Revenue Act permits a city or town to levy a license or privilege tax upon dealers in oil or gasoline.

It is well known that the proviso to this section prevents it operating so far as any State tax is concerned, so long as the State inspection tax law remains unrepealed or unimpaired in its validity. C. S., secs. 4850, et seq. The question then, is whether the provision in Section 60 of the Revenue Act, which declares that no city or town shall levy a license or privilege tax exceeding \$10.00 upon such dealers and only when there is located in such city or town an agency, station, or warehouse for the distribution and sale of such oils, is operative, notwithstanding the fact that the State tax is not operative. We think it was the intention of the Legislature not to separate the two provisions, but to make both dependent for their operation upon the nonpayment of the inspection fees and charges collected under the above named sections of the Consolidated Statutes. This conclusion is shown to be correct by the last clause of Consolidated Statutes, sec. 4856:

No county, city or town shall impose any license or other tax on the sale of gasoline as defined in the first section of this article.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PACKING HOUSES

January 4, 1924.

MR. LUKE LAMB, *Deputy Commissioner, Williamston, N. C.*

DEAR MR. LAMB:—In reply to yours of January 2d.

You state that Wilson & Company, wholesale dealers in packing house products, own and operate a branch office and cold storage plant in Wilson, N. C., from which it supplies its customers in North Carolina after orders are taken for such products. You state that the legal department of Wilson & Company claim that section 58 of the Revenue Act, which imposes a license tax upon every wholesale dealer in meat packing house products who owns and operates in this State a cold storage plant in connection with such wholesale business, does not apply to them.

We think it clear that it does apply to them—see *Lacy v. Packing Company*, 134 N. C., 567. This case was affirmed in the United States Supreme Court, *Armour Packing Company v. Lacy*, 200 U. S., 226. The whole subject was recently discussed by the United States Supreme Court in *Sonneborn Brothers v. Keeling*, 43 Sup. Ct. Rep., 643, and the discussion there sustains this particular tax by inference.

We are citing these cases for the benefit of the legal department of Wilson & Company.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—HOTELS AND INNS—CLUBS

January 9, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

IN RE: *Taxation of Mid Pines Country Club.*

DEAR SIR:—This club is located in Moore County and seems to have been established by wealthy visitors to winter resorts in that county. The membership fee is \$2,500.00. Each member has the privilege of stopping at the club house or sending any of their friends there. This privilege, however, does not relieve them of the necessity for paying the rates charged for board and lodging. It has about one hundred rooms and is not operated for profit but permits no one to use its facilities except members or their duly authorized friends.

Upon this, you ask whether or not in the opinion of this office this club is subject to the tax imposed upon hotels by section 49 of the Revenue Act. That section in levying an annual privilege tax upon hotels, classifies them as American plan hotels, European plan hotels, resort hotels and boarding houses, and provides that the tax levied therein shall not apply to boarding houses charging less than \$10.00 a week. One of the cardinal rules for the construction of a statute is that its terms shall be understood as bearing their ordinary signification unless there is something in the context of the act which gives such terms a more particular definition. This statute evi-

dently intends to tax hotels and all boarding houses charging more than \$10.00 a week. We have in this State a definition of both a hotel and a boarding house in *Holstein v. Phillips*, 146 N. C., 366. The term "hotel" as used in this country is in reality the same as defined by the common law, the hotel simply being an inn of a better class. It is defined a public house of entertainment for all who choose to visit it. It is devoted to the public service and from the earliest period the State has had authority to regulate hotels and inns, both as to the general management and the prices which they charge for transients.

It is manifest that this club house in no sense comes within the definition of a hotel. In the case above cited, a keeper of a boarding house is defined as one who reserves the right to select and choose his patrons, and takes them in only by special arrangement and usually for a definite time. In the opinion of this office, this definition would not, and could not include this club. Indeed, the club itself is more like a community house, in the establishment of which certain selected housekeepers get together, contribute funds to establish it, and then take their meals at this community house for their own private benefit and the benefit of those associated with them, without any idea of profit to the individuals thus associated for their own private purposes.

Consequently, we think that this provision of the Revenue Act does not apply to the Mid Pines Country Club.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

TAXATION—PEDDLING—TRUCKS—INTERSTATE COMMERCE

January 12, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. J. R. COLLIE.

DEAR SIR:—You state that manufacturers of candy in Norfolk, Va., are using the following method in disposing of their product in North Carolina: They load trucks with their candy in boxes and send those trucks into North Carolina for the purpose of soliciting purchasers after the arrival of the trucks in the State, and after those purchasers are obtained, filling the orders immediately from the stock of goods on the trucks, but in the original packages. Upon this you present three questions to this office:

(1) Is this business peddling within section 45 of the Revenue Act of 1923?

The act itself answers this question as follows:

Any person carrying a wagon, cart, buggy, or motor driven vehicle, or traveling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler.

The definition of the statute, then, makes this business peddling.

(2) A person peddling goods of his own individual manufacture is exempt from the tax of the section. Does the sale above described come within this exception of the statute?

The Supreme Court of North Carolina in *State v. Rhyne*, 119 N. C., 905, answers this question as follows:

We have no hesitancy in declaring that the words mean things made by the person who actually does the peddling, not things made by the principal and sold by his agent.

(3) Is the business above described protected by the Interstate Commerce provision of the Federal Constitution from this State license tax upon peddling?

This question is more difficult of solution. In the discussion it must be premised that the act itself neither directly nor in its application discriminates in any way against the products of another state. Residents of North Carolina who peddle, regardless of the source of the goods which they peddle, are subject to the license tax. The same rule is applied also to non-residents. The statute does not tax the sale of the goods; it taxes simply the method of sale, and in that taxation there is no discrimination either against the products of other states or against the residents of other states, in favor of the products of this State or in favor of the residents of this State, as there was in *Welton v. Mo.*, 91 U. S., 275. There is no question here arising from taking orders for these goods and sending the orders to Virginia with their filling through the transportation of the goods over to North Carolina in trucks. That is not peddling, but it is a transaction in Interstate Commerce. The statute does not pretend to impose a tax upon such business and if it did, it would be unconstitutional and void. It is simply a tax upon the method of sale after the goods are brought into the State, applicable alike to residents of the State and nonresidents of the State, and alike to products of the State and products of other states, and consequently, is valid under *Machine Co. v. Gage*, 100 U. S., 676, and *Emert v. Mo.*, 156 U. S., 296. See also *Sonneborn Bros. v. Keeling*, 43 Sup. Ct. Rep., 643.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INCOME TAX—RESIDENTS

January 29, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—You ask this office to interpret the terms "resident" and "non-resident" as contained in the income tax act (particularly sections 104 and 200 thereof), particularly with references to cases of individuals who, while maintaining their voting and tax paying residence in another state, come to North Carolina and spend seven months of the year here at winter resorts.

We think the term "resident" here means a person who comes to North Carolina with the *intent* to make that State his home. It is a combination

of act and intent. The term "nonresident," then, applies as well to those who are here even for seven months without the intent to make North Carolina their permanent home, as to those whose actual residence is without the territorial limits of the State. These seven months' sojourners, then, in North Carolina without the intent to make it a permanent home are non-residents within the meaning of the act.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—OCCUPATION TAX—BLUE SKY LAW

February 15, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—You ask the opinion of this office upon the question, whether or not a person, individual, firm or corporation selling or offering for sale stock in foreign corporations is liable for the occupation tax provided in section 39 of the Revenue Act, when that person, individual, firm or corporation has been licensed by the Commissioner of Insurance under the Blue Sky Law, C. S., secs. 6363, et seq.

We think such dealer is liable for the occupation tax, notwithstanding the foreign corporation whose stock he offers to sell has been licensed by the Insurance Commissioner under the Blue Sky law and notwithstanding the fact that such broker or agent has also been licensed under that law. The Insurance Commissioner under the Blue Sky law, in administering that law by authority of the Legislature, is exercising the police power of the State in order to prevent a perpetration of frauds upon the citizens of the State by the sale of stock in foreign corporations which has no or doubtful value.

Section 39, however, is a revenue measure, pure and simple, with none of the elements of the exercise of what is ordinarily known as the police power of the State. The following cases illustrate the distinction:

Guano Company v. Tarboro, 126 N. C., 68;

Guano Company v. Biddle, 158 N. C., 212.

Guano Company v. New Bern, 158 N. C., 354.

It is familiar learning that, though the State incorporates a corporation for a particular purpose and authorizes it to conduct its business in the State for that purpose, and also levies an annual franchise tax for the privilege of conducting the very business, yet this authority from the State does not exempt the corporation from liability for the occupation tax, although it is levied upon the very business which the corporation is authorized to do.

Cobb v. Commissioners, 122 N. C., 307.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAX YEAR—AD VALOREM TAXES

March 24, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

MY DEAR GOVERNOR:—I have a request from Mr. Varser and another from Mr. Breese, asking me to give an opinion as to what constitutes the tax year for the ad valorem taxes authorized to be levied and collected by the counties and towns of the State. Section 1 of the Revenue Act declares:

The taxes hereinafter designated are payable in the existing national currency, and except as otherwise provided, shall be for the calendar year in which they become due.

No ad valorem tax upon property is levied under the Revenue Act. Under the Machinery Act, owners of property are required to list for taxation such property as they own on the first day of May. See Section 23 of the Machinery Act. And the taxes are declared to be a lien from the first of May.

It seems to me, therefore, that the tax year for the payment of advalorem property taxes is from May to May. Of course, as to the payment of a great many other taxes and the tax year for those taxes, the statute expressly provides.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

INCOME TAX—CONSOLIDATED RETURNS

June 17, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. E. C. BEDDINGFIELD.

DEAR SIR:—A domestic corporation owns all the stock of two other domestic corporations, and upon this you inquire whether the parent corporation may make consolidated returns for income tax for all of these corporations. Using the above statement as an illustration (it, of course, would be varied by the circumstances of each particular case), we think the income tax act of North Carolina requires each corporation as a separate entity to make returns from income tax. The expression invariably used in defining corporations which shall make returns is "every corporation" which of course, means what it says, i.e., that each corporation is, for the purpose of the income tax a separate and distinct entity. See sections 104, 201, 304, 306 (sub-section 5), and 400 (sub-section 4).

Very truly yours,

JAMES S. MANNING
Attorney-General.

FRANCHISE TAX—SHERIFFS FEES

June 25, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. O. S. THOMPSON.

DEAR SIR:—Section 4 of the Revenue Act of 1923 requires the Commission of Revenue, if the corporation franchise tax is not paid by the first

day of December of each year, to certify the same, with 10 per cent of such tax added, to the sheriff or tax collector of the county in which such delinquent corporation has its principal office and charge such sheriff or tax collector with the amount so certified. The sheriff is then required to collect these taxes and he is allowed the same fee for collecting or for levying, advertisement and sale as provided by law for the collection of other taxes. Upon this you inquire, what is the fee that the sheriff is allowed for collecting? This we answer 5 per cent straight, in addition to other costs of levy, advertisement and sale, if there is such levy, advertisement and sale.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—GIFT ENTERPRISE

July 25, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—It seems from the letter of Mr. W. C. Hammond to you dated July 23d, that a drug company in Fayetteville is selling safety razors and giving to each purchaser a regular package of blades. You inquire upon this whether in the opinion of this office that is a gift enterprise taxable under section 53 of the Revenue Act.

We think the seller of safety razors may advertise the fact that he gives with the razors a regular package of blades in order to induce purchasers to buy that particular brand, without being taxable under section 53 of the Revenue Act. It is just his method of stating a fact that he is selling the razor and the blades for a single price. It is not giving a prize for trading with the druggist as an inducement to purchase generally.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INCOME TAX—FOREIGN CORPORATION

August 5, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

IN THE MATTER OF *income tax, Export Leaf Tobacco Company.*

DEAR SIR:—This company claims that the interest it receives on its deposits of money in banks without the State should not be included in its net income for the purpose of estimating its taxable net income within the State of North Carolina. It seems that the money so deposited in banks without the State is part of the assets of the company used in the conduct of its business. That business is the purchase of leaf tobacco upon the markets of the State of North Carolina with a view to its export or sale without the State. In the ordinary course of this business, the markets in which such purchases are made are not open owing to the character of the product itself, which is fit for market only at recurring seasons of the year. The funds from which the company then derives its interest are quiescent only for a short period, but are to be used by the company in the conduct of its business later in this

State and in other states in which it does business. The company itself is, of course, a foreign corporation doing business in the State of North Carolina and derives its profits principally from the ownership, sale or use of tangible personal property.

The statute, section 201 of the Revenue Act of 1923, in arriving at the net income of such corporations, separates them into two classes: first, a corporation deriving its profits principally from the ownership, sale or rental of real estate or from the manufacture, sale or use of tangible property; second, a corporation deriving its profits principally from the holding or sale of intangible property. Manifestly, the Export Leaf Tobacco Company falls within the first class. Where a corporation is situated with relation to the State in the way in which this corporation is, it is, of course, impossible for the Legislature to devise a scheme in estimating the net income from that corporation which would in all cases be absolutely fair and just. The purpose of the act is to tax the income derived from the use of property within the limits of the State. The machinery used for arriving at this net income is to take the proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year bears to the fair cash value of its entire real estate and tangible personal property wherever located. The standard fixed, then, by the statute is the proportion of the fair cash value of its tangible property wherever it may be to the fair cash value of its tangible property within the State of North Carolina.

While it is true that the State cannot, and does not, intend to tax incomes earned by property out of the State or by the company out of the State, yet such is the nature of the question with which the Legislature is dealing that it has the right to adopt a fixed standard which in its operation when applied to a particular class brings about approximately and fairly and justly, the result intended. You have already held that income derived from independent if not permanent investments by this company in the stocks and bonds of other corporations located in other states is not to be included in the net income derived by the corporation by its business at large in computing the net income to be allocated to North Carolina. This ruling of your Department seems clearly correct under *Meyer v. Wells, Fargo & Co.*, 223 U. S., 298; *People ex rel. Alpha P. C. Co. v. Knapp*, 230 N. Y., 48. This case was subsequently attempted to be carried to the United States Supreme Court by the State of New York for a review of the decision of the New York Court of Appeals by an application for a certiorari. This application was denied by the Supreme Court of the United States in 256 U. S., 702. We think there is nothing inconsistent in this, your former ruling, with holding that in the particular instance the interest on funds so related to the business of this company in North Carolina must be included in the general net income in determining the part of such net income to be allocated to the State of North Carolina. The money itself is temporarily at rest and is to be used by the company in its business conducted partly in North Carolina and partly in some other state or states.

That there is nothing unconstitutional in the method adopted by the State of North Carolina to obtain this allocation appears from *Underwood Typewriter Company v. Chamberlain*, *Treas. of the State of Conn.*, 94 Conn.,

47, and in the same case in the United States Supreme Court, 254 U. S., 113. The North Carolina statute in the part of it under consideration was copied from the Connecticut statute. In the opinion of the United States Supreme Court it is said:

The Legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the process conducted within its borders. It, therefore, adopted a method of apportionment which all that appears in this record reached and was meant to reach only the profits earned within the state.

In other words, the method of apportionment adopted by the State in its application to such corporations, section 201 above, is not inherently arbitrary, nor does its application to this particular corporation in the manner herein suggested produce an unreasonable result. It is said in *Atlantic Coast Line Railroad Co. v. Doughton*, 262 U. S., 413:

The term "net income" in law or in economics, has not a rigid meaning. Every Income Tax Act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy. As to them states differ; and there is apt to be difference of view in the same states at different times; and at the same time a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a state income tax which is otherwise unobjectionable.

It is understood, of course, that the fund so deposited in banks out of the State occupies the relation to the business of the corporation conducted in the State of North Carolina stated above. If it is a permanent investment of permanent (not current) funds, then your ruling in regard to such investments in stocks and bonds without the State would apply likewise to this. We think you have no authority, if you include interest so derived in the general net income of the corporation, to include the deposit itself in estimating the value of its tangible property. The statute itself does not contemplate this, but uses the terms "tangible and intangible property" according to their well known and definite signification.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

PIANO DEALERS—LICENSE TAX

August 12, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—Section 674 of the Revenue Act in taxing dealers in pianos, organs, graphophones, etc., uses a method which in some particulars is like the method adopted in section 78 in taxing dealers in automobiles. It per-

mits the dealer in these musical instruments to pay an annual license tax of \$50.00, and also a sales tax in the method provided in the act. Then it declares:

Any person, firm or corporation taking out license under this section may employ an unlimited number of agents and secure a duplicate copy of said license for each agent by paying a fee of one dollar to the Commissioner of Revenue. This duplicate is to contain the name of the agent to whom issued, and he is thereby licensed to sell only the instruments authorized to be sold by the holder of the original license.

Where, therefore, the manufacturer pays this license and reports in accordance with the statute for the additional sales tax provided in the section, he has the right to appoint these subordinate agencies and to secure duplicate licenses for them as above said. The interpretation of the Supreme Court in the Automotive Association case, 187 N. C., 25, will apply to these dealers, we think.

You will find some rulings of this office upon this particular section in the biennial report of the Attorney-General for 1921-22.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REAL ESTATE DEALERS—LICENSE TAX

August 12, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. C. B. Bogart to you dated August 8th. He asks through you an interpretation by this office of section 30 of the Revenue Act, which imposes a license tax upon dealers in real estate and collectors of rent for compensation. What we write is supplementary to an opinion rendered by this office to your office on April 9, 1923, a copy of which we inclose.

Since the ruling of 1923, the Supreme Court has had before it the interpretation of section 78 of the Revenue Act, particularly with relation to the license tax imposed upon agents of the dealers in automobiles. We find nothing in the opinion in that case—*Carolina Automotive Association v. Cochran*, 187 N. C., 25, which conflicts with the ruling of this office on April 9, 1923. The Court in that case held that the \$500.00 license tax paid by a dealer protected his agents and servants working in and about the place of business wherein the \$500.00 license was to be posted from an additional license of \$5.00. It further held that traveling agents of these dealers must have with them a duplicate license issued by the Revenue Commissioner at the request of the dealer, in order that they should be protected. It further held that such duplicate license issued to an agent located in a place other than that of the place of business of the dealer not only protected him, but also his servants and agents working in and about his place of business.

We think there is a manifest distinction between the provisions of section 78 and those of section 30. As you know, if a section of the Revenue Act had imposed a license tax upon a person engaged in a particular business, without anything else, it would apply as well to corporations as individuals under C. S., sec. 3945, sub-section 6. Section 53, where the terms "person or establishment" are used, illustrates the rule of construction. Where, however, the statute intends to specifically tax a corporation, the form of words used is "every person, firm or corporation." The very next section, i.e., section 31, uses the latter form of words in levying a license tax upon real estate auction sales. The general rule of statutory construction is that in interpreting a statute, in order to arrive at the intent of the Legislature, due consideration must be given to all the words used in the statute.

Now, it is remarkable that in this particular section the Legislature does not use the terms "every person or firm" but uses "every individual or firm." "Every individual" in itself thus used would exclude the construction that it was intended to apply to a corporation. So far as we have discovered, that is the only section in which the term "individual" is used except section 44, where the other terms used are inclusive both of firms and corporations. Allowing, therefore, due weight to the use of the term "individual," it seems that our former construction of the act is still correct.

The section does not contemplate the issue of duplicate licenses. It does tax every individual or firm or his or their agents. Section 95 deals with this situation in that part of it in which it is declared:

No officer required to issue license under this act shall have authority to issue a duplicate of any license unless expressly authorized to do so by this chapter, but each person, firm or corporation shall be required to take out a separate license for each agent.

Now, the particular business which is taxed is not located, in the sense that it is transacted within the limits of a single building or office. It necessarily from its nature contemplates action outside of the office, both in collecting rents and in selling land. Consequently, the license posted in the office could not have been intended by the Legislature to protect the agents of the concern doing business outside of the office. One of the employees, however, in the office selling real estate as such employee in the office would be protected by the license posted in that particular place. Further than that we think the statute does not go in the protection of the employees of these real estate agents.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

INHERITANCE TAX—CONTINGENT REMAINDERS

September 29, 1924.

HON. R. A. DOUGHTON, *Commissioner of Revenue, Raleigh, N. C.*

ATTENTION OF MR. J. R. COLLIE.

DEAR SIR:—We have considered the question arising upon the inheritance

tax to be paid by the ultimate legatees of Mrs. P. E. Gatling under her will dated February 13, 1912, and probated April 18, 1912, in Edgecombe County.

At the time this will was probated there was no machinery by which the interest of contingent remaindermen could be appraised, nor, indeed, is there now any such machinery. Mrs. Gatling devised all of her property to S. S. Nash as trustee to hold the legal title, while her husband, R. H. Gatling, was to control the said property largely at his will. In Item 3 she provides that if her husband should marry again, and die, leaving a widow or child surviving him, then and in that event all the residue and rest of the estate remaining at the death of the husband was devised and bequeathed to such persons and in such way as her husband by his last will and testament might direct.

Mr. Gatling died in 1924, not having married a second time, nor did he leave a last will and testament appointing beneficiaries thereunder as permitted by his wife's will. The ulterior limitations contained in his wife's will upon the happening of all these events just recited vested in the persons designated by Mrs. Gatling's will. We think, therefore, that these contingent remainders having become vested in the death of Mr. Gatling, they are liable, each of them, to the proper inheritance tax thereupon. *State v. Bridgers*, 161 N. C., 247.

We return herewith copy of Mrs. Gatling's will.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO STATE HIGHWAY COMMISSION

STATE HIGHWAY COMMISSION—CONTRACTORS BOND

April 30, 1923.

HON. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

IN THE MATTER OF *R. M. Hudson Company, Project No. 460.*

DEAR SIR:—It appears that the above company were contractors upon the above project and that on April 25, 1923, notified the State Highway Commission that they were unable to complete their contract. Thereupon, the State Highway Commission notified the Maryland Casualty Company, surety upon the contractor's bond of R. M. Hudson Company, of the default of that Company.

At the time of the default the State Highway Commission owed the R. M. Hudson Company certain sums of money, the amount of which has not yet been definitely ascertained. Whatever that amount may be, it is claimed by the Maryland Casualty Company under a collateral contract entered into between said Casualty Company and the said Hudson Company at the time of the execution of the bond.

During the progress of the work in Orange County, to wit: On September 22, 1922, the Hudson Company made an arrangement with the Bank of Orange, located at Hillsboro, N. C., by which it was enabled to meet its weekly payroll. That arrangement involved the assignment by the said Hudson Company to the said Bank of Orange of any sums of money due the said Hudson Company by the State Highway Commission during the progress of the work. The State Highway Commission was directed to pay over said sums, when ascertained, to the Bank of Orange, and upon the execution of such agreement, the Bank of Orange immediately gave notice to the State Highway Commission of its claim on sums of money becoming due to the Hudson Company, and sent the Highway Commission a copy of Hudson & Company's assignment and of the contract accompanying it, and the Highway Commission agreed to act upon the direction of the said Hudson Company.

It is manifest from this short statement that the State Highway Commission has in its hands a sum of money belonging to Hudson Company upon which two corporations set up a claim. We think you, by this condition, are not authorized to adjudicate the matter between these corporations, but you should notify each of them of the claim of the other, and inform them that you are ready to pay the money over to the party entitled, as may be determined by the judgment of some court of competent jurisdiction. In other words, act as a stakeholder until you are directed by the court to pay the money over to one or the other of these claimants.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATE HIGHWAY COMMISSION—RAILROAD CROSSINGS

May 8, 1923.

MR. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*SUBJECT: *Participation of Railroad Companies, Highway-Railroad Crossings.*

DEAR MR. PAGE:—Your letter of the 7th inst. is received relative to the above subject. I understand that the underpass referred to by Mr. Clayton Moore is in the corporate limits of the town of Williamston and that this underpass is inadequate to meet the requirements of the traveling public. Under the decision of the Supreme Court in the recent case of the *City of Durham v. The Southern Railway Company, et al.*, the town authorities have the power to compel adequate underpasses and have the power to compel the railroad companies to pay the costs of such underpasses. I think the town of Williamston has the same power, and I suggest that you advise Mr. Moore that he have the town authorities of Williamston, N. C., to pass the proper resolutions, notifying the railroad company of the enactment of the resolutions, and fix the time when this underpass must be adequately enlarged or strengthened. If the railroad company then desires to act in coöperation with your Commission, I think you can take the question up with it.

In my opinion, the amendment to the law at the last session of the General Assembly is sufficient, but it is not clearly so. The railroads where an underpass is now in existence, may take the position that that act is limited to entirely new underpasses, and does not embrace the enlargement or strengthening of existing underpasses. In my opinion this would be a very narrow construction of the law and would not accord with its spirit, but it is clear from the decision of the Supreme Court in the case above referred to, that the town authorities have ample power under their general power to promote the public welfare and the public safety. The City of Durham in the above case acted upon no specific power but under its police power to promote and protect the public safety and public welfare. In that case the governing authorities of the city directed the entire cost to be paid by the railroad companies and prescribed the size of the underpass and its construction, limiting the time when the railroads should begin work.

It is true that the railroad companies have sued out a writ of error to the Supreme Court of the United States in the above case, and while it is hazardous to venture an opinion as to what the Supreme Court of the United States will do with this appeal, I feel a reasonable confidence that the opinion of the Supreme Court of North Carolina will be sustained. The governing authorities of the town having this power, it might be a question for you to determine whether or not you would be willing to contribute a part of the necessary expense incurred in the enlargement and strengthening of the present underpass. Whether the underpass as now exists is adequate to the needs of the public travel is a question for the determination of the authorities of the city and it does not present a question for a jury to pass upon. This was raised in the Durham case and decided adversely to the contentions of the railroads.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATE HIGHWAY COMMISSION—FREIGHT CHARGES

May 18, 1923.

MR. HARRY B. HENDERLITE, *State Highway Commissioner, Raleigh, N. C.*SUBJECT: *Freight Charges.*

DEAR SIR:—In reply to yours of May 17th.

Under the conditions set out in the letter of the Arundel Corporation to Mr. Page of date May 11th, there was a mutual mistake of fact in the charge of freight to J. A. Kries & Son by the corporation. When the error was discovered by the Atlantic Coast Line and the corporation was compelled to pay the freight in excess of what it had paid before, that payment is a valid charge against Kries & Son, which may be enforced by the corporation. So, their request to you that before final settlement with Kries, sufficient money be withheld to pay this additional freight charge is, we think, sound.

We return herewith the letter of the corporation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGHWAY CONTRACTORS—CONDITIONAL SALE

May 29, 1923.

MR. HARRY B. HENDERLITE, *State Highway Commission, Raleigh, N. C.*

DEAR SIR:—In reply to yours of May 28th.

It seems that some of the contractors doing work upon the State highway system have purchased machinery for use upon the highway system upon contracts which reserve the title to such machinery in the seller until it is fully paid for. Some of these contractors having these outstanding unpaid purchase money contracts have defaulted in their work. Under their contract with the Commission, when this is the case, the Commission or any one authorized by it may take possession of or use or cause to be used in the completion of the work, or any part thereof, any such machinery, implements, tools, or materials of any description as shall be found upon the line of said work, and thereafter accounting for or paying to the contractor a reasonable compensation for the use of said machinery, implements, tools, or materials.

You ask us to determine the priorities between your Commission and the sellers under these contracts reserving title until the purchase money is paid. C. S., sec. 3312 requires conditional sales of personal property in which the title is retained by the bargainor to be reduced to writing and registered as are chattel mortgages in the county where the purchaser resides, or, in case the purchaser shall reside out of the State, then in the county where the personal estate or some part thereof is situated, as against purchasers for value or creditors. If the conditional sale is properly registered in the county where the purchaser resides, that registration is sufficient throughout the State, though he himself, taking the property with him, may remove to another county in the State.

We think it clear that the Highway Commission under its contract would be a creditor within the meaning of this record statute. Where, then, these conditional sales are not properly recorded in accordance with the statute, of course, the Highway Commission's right would be superior to the right of the seller. Where they are properly recorded, then we think the right of the Highway Commission would be subordinate to that of the seller in the sense that the Highway Commission would be responsible to the seller for the value of the property at the time it was taken over. Such value, however, to be decreased by the payments theretofore made upon the contract price of such machinery. It would be well, then, where such conditions exist, to make terms with the seller in such way as to permit the Commission to use the property, accounting to the seller for the reasonable compensation for its use, and allowing the seller at the completion of the work to take the property under its contract and sell it for the balance of the purchase money.

We return herewith the letter of Messrs. Brown & Boyd, submitted to us in your letter.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAY COMMISSION—AUTOMOBILES—CITY LICENSE

June 23, 1923.

CAPT. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

RE: *Ordinance passed by the City of Raleigh requiring local tag, and licensing driver.*

DEAR MR. PAGE:—Your letter of June 20th is received. You have been misinformed as to my having expressed any opinion at all about the above subject. I have discussed the matter this morning for the first time with Mr. Nash, and without stating any of the reasons which led me to the conclusion. I agree with Mr. Nash in his advice to you, to wit: That neither your drivers nor the machines owned by the State Highway Commission are subject to the license tax on the machines or to the driver's tax levied by the City of Raleigh.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAY COMMISSIONER—AUTHORITY

July 30, 1923.

MR. HARRY B. HENDERLITE, *State Highway Commission, Raleigh, N. C.*

DEAR SIR:—In reply to your letters of July 25th.

(1) You inquire how long a claimant against a state contractor may wait before entering suit or recovering damages from the bondsmen of State contractors. If the claimant has a valid claim against the contractor, his suit against him would not be barred under the general law until a lapse of three years from the date of the furnishing of material or doing the labor. The

surety companies upon the bonds of these contractors recognizing this general limitation, exclude its operation in every instance to which my attention has been drawn, by including in their surety contract a provision fixing the time within which they may be sued upon the bond. This change of time is legitimate, provided it is not made so short as to constitute an unreasonable restriction upon the rights of the claimant. Perhaps six months would not be an unreasonable time.

(2) Under the statute, Mr. Page has authority to do all the acts which the State Highway Commission is authorized to do when said Commission is not in session. In the signing of contracts to do the labor upon State highways, he is then exercising the functions of the State Highway Commission. If he does not personally exercise this function by signing his name to the contract, he may authorize one of his engineers to do it in a particular case in his behalf, or after it is done in his name by this engineer, he may adopt the contract and the signature in the particular case as his own. We think he has not authority to give a general delegation of this power to a particular man as it involves an exercise of judgment and discretion. In the particular case, no harm could be done by his adopting the signature heretofore made to the contract by Mr. Ames.

We return herewith the copy of the contract enclosed to us.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

HIGHWAY—STANDING TIMBER—LAPS

September 24, 1923.

HON. WALTER L. COHOON, *State Highway Commission, Raleigh, N. C.*

Use of Wood on Right-of-way for fire.

DEAR SIR:—We have considered the question arising upon the controversy of the O'Brien Construction Company with Mr. B. F. Wagoner.

It seems that in construction of Project No. 702 in Allegheny County, the contractor, the O'Brien Construction Company, in obedience to provisions contained in its contract with the State Highway Commission, cleared off the right-of-way of the highway certain standing timber, cutting all of the same to merchantable size, into merchantable lengths, and all of this was taken by the landowner, Mr. B. F. Wagoner. The contract of the Construction Company required it to remove from the right-of-way all laps and bushes. In obedience to this provision of the contract, the Construction Company did remove these laps from the highway and used them as firewood in making fires for the purpose of generating steam with which to do drilling for the removal of rock on said Project.

We think in the absence of a special contract between either of the State Highway Commission or the Construction Company with the landowner, that the Construction Company by thus using these laps and waste timber incurred no liability for their value to said landowner. Trees standing where there are no special circumstances which give them artificial value so standing, are not commercially worth as much as the timber into which they

are converted by cutting them down and sawing them into commercial lengths. Mr. Wagoner, then, in getting this timber so prepared, got more than he was damaged by the cutting of the trees and it seems, therefore, that he was fully compensated for the damage in cutting them.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGHWAYS—CONTRACTORS BOND—PREMIUM

November 6, 1923.

MR. HARRY B. HENDERLITE, *State Highway Commission, Raleigh, N. C.*

DEAR SIR:—If a surety company delivers a surety bond securing the contract for a highway contractor and does not collect the premium thereupon before the delivery of the bond, its claim against the contractor has no higher dignity, we think, than any other credit. We do not think that, whether or not the premium has been promised to be paid by a negotiable instrument, would affect the question.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAY COMMISSION—CONTRACT—CONSTRUCTION

December 12, 1923.

MR. HARRY B. HENDERLITE, *Assistant State Highway Engineer, Raleigh, N. C.*

DEAR SIR:—You ask the interpretation of this office of the following provision of the contract entered into by contractors and the State Highway Commission, particularly with reference to these terms "during the construction" of this project:

It is understood and agreed that if during the construction of this project there is an increase in freight rates on materials entering and becoming a part of the finished project, that such increase when properly shown by receipted freight bills, shall be paid by the State Highway Commission to the Contractor, and conversely, should there be a reduction of freight rates on said materials, then the amount of such reduction shall revert to the State Highway Commission and will be deducted from any money due the Contractor on said project.

The object in construing contracts where a doubtful term is used is to arrive at the meaning of the parties at the time the contract was executed. Strictly interpreted "during the construction of the project" would refer only to the period beginning at the actual entrance upon the work of construction by the contractor. The subject matter, however, of the contract in this particular is dealing with freight rates upon material used in the construction of a particular project. This being true, we are of the opinion, although the question is not free from doubt, that it relates not only to freight rates paid after the beginning of the actual construction, but also those incurred, and necessarily incurred, after the contract is signed in

preparing to enter upon the construction by providing the materials necessary for that construction. This seems to have been the meaning of the parties to the contract at the time it was entered into, when taken in connection with the requirement that the construction should be commenced within ten days of the signing of the contract. The contractor must necessarily assemble the materials, or a portion of them, in preparation to entering upon the construction of the project. This ruling, however, does not apply to freight paid before the execution of the contract upon material which a contractor has on hand at the time and proposes to use in the construction of the project, but only to those freight rates incurred between the time of the execution of the contract and the beginning of the construction of the project in contemplation of such beginning.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAY COMMISSION—CONTRACT—CONSTRUCTION

December 31, 1923.

HON. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

IN RE: *Project No. 940, Haywood County—R. G. Rand, Contractor.*

DEAR SIR:—It appears from an inspection of the papers left at this office, that this project was undertaken by Alexander & Patton, Contractors, but that on the 19th of June, 1923, these contractors finding themselves unable to complete the work, surrendered the contract. On July 28th, after notice to the National Surety Company, surety upon the contract of Alexander & Patton, and with the consent of said surety company, the completion of the work upon Project No. 940 was contracted out to R. G. Rand, who gave the Fidelity & Deposit Company of Maryland as his surety for the proper performance of the contract in the sum of \$40,000. We do not find it necessary to state in full the particulars of the contract made with R. G. Rand and the settlement made by you with the National Surety Company at the time of that contract.

It is quite clear, we think, from the contract itself that the requirement that the work should be completed within one hundred and fifty working days from August 1, 1923, was of the essence of the contract with Rand. Indeed, at the time that Rand signed the contract, and at his own suggestion, the time of the original contract with Alexander & Patton was extended to one hundred and fifty working days as above said, upon the payment by the National Surety Company of \$500 as compensation for additional costs arising from such extension.

It appears further upon this point that the completion of this work within this period was essential from the standpoint of the State Highway Commission, because when it undertook the construction of its Project No. 944 and blocked the traffic upon that project, the only road which could be used by the people of that section would be the completed Project No. 940, and this was well understood by Mr. Rand and the Fidelity & Deposit Company at the time that the contract was entered into. Commencing September 21, 1923, and up to date, you as Chairman of the State Highway Commission con-

tinually urged upon Mr. Rand the necessity for the completion of this work within the period prescribed by the contract, one hundred and fifty working days from August 1, 1923.

The contract signed by Mr. Rand and the State Highway Commission on July 27, 1923, contained this provision, among others:

That the contractor within ten days after the signing of this contract will give bond satisfactory to the Commission in the amount forty thousand dollars (\$40,000.00) and will begin and complete all work remaining to be done under the defaulted contract between the Commission and Alexander & Patton within one hundred and fifty (150) working days in accordance with the plans, general and special provisions, specifications and unit prices displayed in defaulted contract, provided, however, that the item "Waterbound Macadam" shall be and hereby is canceled and in lieu thereof the item "Gravel two-course" shall be and hereby is substituted, and provided further that the item "Overhaul on gravel surfacing" appearing in the defaulted contract shall be and hereby is canceled. No overhaul whatever will be paid on surfacing hauled outside the free haul limit mentioned in the defaulted contract.

It is manifest, we think, from this that all the general and special provisions contained in the original contract of Alexander & Patton were by reference made part of the contract with Rand except as particularly modified in that contract of July 27, 1923.

Now, in the contract with Alexander & Patton, section 68 expressly authorizes the State Highway engineer to annul the contract when he has substantial evidence that the progress being made by the contractor is insufficient to complete the work within the specified time. That section requires that both the contractor and his surety will be notified in writing by the State Highway engineer of the conditions which make annulment of the contract imminent, fifteen days before the contract is declared annulled. The object of this notice is, of course, to enable the contractor to bring the work forward to such a state that it may be completed within the time limit, so as to avoid the annulment of the contract. The correspondence between yourself and Rand, contained in the file of papers left with us, shows that though your warnings to him commenced September 21st and have continued to date, he has taken no effective means to remedy the condition which shows that he cannot complete the work with his present force and present machinery within the one hundred and fifty working days limit.

We think, therefore, that under the peculiar circumstances of the case, you would be justified in annulling the contract and taking over the work yourself in order that it may be completed within the necessary contract time. We find nothing in the contract with Alexander & Patton which authorizes you, however, to take over the machinery which Rand has upon the premises, in order that you might complete the project. This provision seems to have been omitted from the Alexander & Patton contract. If such provision is in that contract, we have been unable to find it. It is usually incorporated in section 68 of the contract. If such provision is not in this contract, you, of course, have no authority in case you annul Rand's contract,

to take over the machinery belonging to him in order that you may finish that contract.

From Mr. Rand's letters to you, particularly that of November 23, 1923, it appears that he is relying upon the penalty prescribed in section 67 of the Alexander & Patton contract, and this part of your letter to the National Surety Company of date July 28, 1923: "the new contractor, R. G. Rand, and his surety, the Fidelity & Deposit Company of Maryland, assuming a liability for engineering fees after the expiration of one hundred and fifty working days from August 1, 1923" as providing the only remedy for the Highway Commission in case the project is not completed within the one hundred and fifty days provided by the contract. We, however, do not interpret the contract in this way. We think that the Highway Commission has two remedies under the contract in case of such delay; first, under section 67, upon which Mr. Rand relies, and second, under section 68, which provides the machinery for annulling the contract.

We return herewith the file of papers concerning this project, this having been left at our office by you.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAY COMMISSION—BANKRUPTCY OF CONTRACTOR

February 21, 1924.

HON. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

DEAR SIR:—In the administration of your office, a situation is presented for your determination arising out of the following facts:

A, a contractor, undertook to construct and complete a project in the State Highway System, giving a surety bond in the usual form for the performance of his contract and the payment of claims due laborers and material men. This project was completed by A and at the time of its completion there was in the hands of the State Highway Commission \$10,000 of retained percentage upon this project. There was an extension of this project which A undertook to construct and complete under a contract executed August 7, 1923. In stead of giving bond in a surety company, A at the time agreed that this \$10,000 should be substituted in lieu of bond to secure the proper performance of his contract upon the extension of project No. 677. This amount arising in this way is still in the hands of the State Highway Commission. A thereupon entered under said contract upon the construction of the extension.

He sub-let the grading of this extension to B, and B entered upon such work under a contract between himself and A. During the progress of the work upon this extension, A was declared a bankrupt under a petition of his creditors, December 23, 1923. Upon the bankruptcy of A, the State Highway Commission, acting under a provision of its contract with A for this extension work, took charge of the work and completed it, itself. Before A's bankruptcy, however, he had incurred an indebtedness to the sub-contractor B in the amount of \$1,000. The State Highway Commission has in

its hands \$10,000 of retained percentage upon the work done by A upon this extension.

It seems that at the time of the completion of project No. 677 and at the time of the execution of the contract for the work upon the extension, August 7, 1923, there were outstanding claims by laborers and material men for work and material furnished on project No. 677, but not to an amount great enough to absorb the \$10,000 of money retained upon this project, which under the contract of August 7, 1923, was substituted as a bond by A and the Highway Commission.

Upon this statement, you ask the opinion of this office upon certain points presented therein:

(1) Under the contract with A for the extension work, would the Highway Commission be justified in law in paying the sub-contractor B the sum of money due him by A for labor done by B upon the extension work before A became bankrupt?

We think that the Highway Commission would be protected in such payment by its contract with A. The Commission, however, must be thoroughly satisfied of the validity of this claim, both as to amount and liability, for, to the extent that it pays it, if the amount was not correct or the liability not real, it might hereafter be liable to A's trustee in bankruptcy, as such sum under the principles hereinafter set out might constitute part of the assets of the bankrupt's estate. Stated in one sentence, "Be sure you're right (in this particular), and then go ahead."

(2) The \$10,000 of retained percentage upon the completion of project No. 677 being devoted to the purpose to which A and the Highway Commission devoted it, without the consent of the surety company upon A's bond upon project No. 677, that amount would be subject to all claims for labor and material furnished to A upon project No. 677 which had not been paid by A at the time of the completion of the contract. The surety company, then, would be entitled to have such part of this \$10,000 as is necessary devoted to this purpose in its exoneration.

(3) The Highway Commission upon A's bankruptcy having itself taken over the completion of the extension contract, would be entitled to all of the first \$10,000 not necessary to be used in the exoneration of the surety company, and of course, to all of the second \$10,000 in paying the expenses of the work which itself took over the claims of laborers and material men left unpaid by A at the time of his bankruptcy on the extension work. If after all expenses are paid in this way there is any balance or profit upon the contract which under normal conditions would go to the defaulting contractor under his contract, this would be a part of the assets of the bankrupt's estate and would go to his trustee in bankruptcy.

(4) When the Highway Commission took over the extension project upon the bankruptcy of A, it was discovered that the machinery used by A upon the work in reality belonged to D. The Highway Commission, ascertaining this, gave D the alternative of being paid a reasonable rent for this machinery or of taking over to himself at the completion of the contract any profit that might be shown upon such completion. D chose the latter alternative. We think that in a case of this sort in a question between the

Highway Commission and the trustees in bankruptcy of A, the Highway Commission could charge in reality only what was a reasonable rent for this machinery. If D received more under the exercise of the alternative than would be a reasonable rent for the machinery, then in the opinion of this office, the difference could be collected by the trustee from the State Highway Commission.

We think it quite clear that, limited as above stated, the contract of August 7, 1923, expressly makes the sum of money so deposited by A surety for the performance of the contract and subject to the same like terms and conditions as such suretyship when executed by a bonding company, with this difference: That said sum is devoted by the parties to the contract to the payment of all claims for labor and material in the execution of the extension contract.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATE HIGHWAY—STREETS

May 26, 1924.

CAPT. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

SUBJECT: *Construction of Grade Crossing Law.*

DEAR SIR:—Taking the Franklinton situation as a concrete illustration, it is my opinion that you have the right to change the State Highway from the main street of the town. At present it is now used as a part of your highway, Route 70, and crosses the Seaboard Air Line main track at grade. Moving the location back some hundred feet, you can secure an underpass for your highway, thus avoiding a grade crossing for it. The question what the town will do with its grade crossing of its main street is a matter that the town and the railroad company will have to adjust. In my opinion, you clearly have the right to relocate the part of the highway in the town of Franklinton, especially as the relocation eliminates a grade crossing. Having this power, I think it necessarily follows under the law that you have the right to call upon the Seaboard to contribute its part of the expense.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HIGHWAYS—PRIVATE ENTRANCES

May 27, 1924.

CAPT. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

SUBJECT: *Private Entrances.*

DEAR SIR:—Your letter of the 14th inst., dealing with the above subject, requests my opinion as to the obligation of the State Highway Commission in building or expending State money upon what is termed "private entrances into State highways" where the Commission is building a new road or altering the grade of a former road. You further ask, is it the obligation

of the State to build a private entrance leaving a house into the State highway?

The Supreme Court held in *Jones v. Town of Henderson*, 147 N. C., 120, that an abutting lot owner in a town or city has the right of ingress to and egress from its lot, subject to the right of the town to grade and repair the street, provided it is done in a careful manner. But if the town in the exercise of its authority to grade streets, including the side-walks, proceeded with the work in a negligent or unskillful way by reason of which the plaintiff's property is injured, he is entitled to recover damages for the injury simply because the town did not act in pursuance of its rightful authority to change the grade of the street, but exceeded it when it did the work in a negligent and unskillful manner. This case has been affirmed many times, and as late as 1918, in the case of *Youmans v. Hendersonville*, 175 N. C., 574. In section 7, Chapter 2, Public Laws of 1921, and in other sections of that act, the Highway Commission is given express power to change or alter the grades or locations of roads constructed by it. In my opinion, this power is as ample with the State Highway Commission as it is with towns or cities. I am rather inclined to think that it is even broader because the power to sue the State Highway Commission for damages has been denied by the Supreme Court.

You will, of course, understand that some times it is not always expedient to go to the full limit of your power, especially in the administration of public matters. This position is well set forth in the case of *Jones v. Henderson*, above quoted.

While municipal corporations act in their judicial and governmental capacity in grading the public streets, they are yet bound in the performance of their work to exercise care not to injure others. They should consider the public interest upon the questions that come before them for decisions as governmental bodies, and if any individual suffers damage because of their decision or because of the lawful work that they do, he has no remedy unless it be given him by statute. But his rights must be respected by the municipality, and if it trespasses upon his property or if he is injured by its negligence in doing the work or by the negligent way in which the work is left, he may recover the damage he has suffered.

These citations give you as nearly as I can the decisions of our Court upon the subject.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGHWAYS—STOP SIGNS

July 24, 1923.

HON. FRANK PAGE, *Chairman, State Highway Commission, Raleigh, N. C.*

DEAR SIR:—In reply to yours of July 17th.

You state that some of the railroads have placed "N. C. Law—Stop" signs on public roads running parallel to the railroads in such way as to make it

appear to drivers of motor vehicles that the signs apply to the State Highway, whereas, the State Highway did not cross the railroad at all, but this public road after crossing the highway does, itself, cross the railroad. Where the sign is erected, the distance in a direct line from the railroad is not 100 feet, but where the public road crosses the railroad, the distance is 100 feet. You state that the tendency of this is to make drivers of motor vehicles on the State Highway obey the sign and stop, and upon discovery that it does not apply to the State Highway, to fail to stop further on where the sign applies directly to the State Highway.

It appears that this is a situation that cannot be avoided by any construction of the law. In placing the stop signs as they did, 100 feet from the crossing and not 100 in running directly to the railroad, the railroads obeyed the law. The resulting confusion is not to be attributed to them as it appears to be a matter which cannot be remedied without some disregard of the law itself.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HIGHWAYS—ASSESSMENTS—SCHOOL PROPERTY

December 19, 1922.

DEAR SIR:—In reply to yours of December 18th.

Whether or not public school property within the bounds of a special assessment district is liable for special assessments for street improvements is a difficult question. There are numerous decisions on both sides of the question. The strength of the position that the school property is liable for special assessments is found principally in the concluding words of Consolidated Statutes, sec. 2710:

No lands in the municipality shall be exempt from local assessment.

It is very clear that the absolute exemption contained in section 5 of Article 5 of the Constitution, "property belonging to the State or to municipal corporations shall be exempt from taxation" does not exempt such property from local assessments, such assessments being distinguished by the decisions of our Court and all other courts from taxation of property. In 12 Ann. Cas., at page 419, you will find quite a full note on the liability of school property to special assessments. That note cites numerous decisions which hold that such property is not liable even for assessments, and then cites other decisions which hold that it is liable. Judge Cooley in his work on taxation, at page 458, says of such assessments:

Even public property is often subject to these special assessments, there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under eminent domain.

The opposing principles are well illustrated by these two quotations, the first from *St. Louis Public Schools v. St. Louis*, 26 Mo., 468, and *Inhabitants of Worcester County v. Worcester*, 17 Am. Rep., 159 (Mass.):

The result of the contrary doctrine would be that every ordinance for paving a street or making a sewer in a district of the city in which the public schools had property, would be virtually to tax the citizens of the district for an increase in the funds of the public school.

This is especially applicable in North Carolina, where public schools are held to be not a necessary expense to the citizens of a municipality.

Its property constitutes one of the instrumentalities by which the State performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that said property was subject to taxation in any form unless it were made so by express enactment or by clear implication. This property of petitioner's is not, indeed, in legal form the property of the Commonwealth but the authority by which the county holds it is derived from the statutes by which the duty is imposed upon the various counties of providing suitable courthouses, jails and houses of correction.

The Court in that case held a city could not levy an assessment for local improvements upon county property. This principle would apply in double force in North Carolina, because the maintenance of schools is made not only a State and county function, but a mandatory duty.

That the general term "taxation" does not include local assessments appears inferentially from *Lewis v. Pilot Mountain*, 170 N. C., 109, and other cases which I have not had time to find. If you will examine 23 L. R. A., 807; 18 L. R. A. (N. S.), 451; 139 Am. St. Rep., 45; 6 L. R. A., 155; 94 Am. St. Rep. 301; 44 L. R. A. (N. S.) 57; 35 L. R. A., 33; 16 L. R. A., 418; Ann. Cas. 1916D, 61; L. R. A. 1916F, 861; Ann. Cas. 1913D, 1101, you will find some discussion of the principles. It is universally held in all the cases that there is no question of the power of the State Legislature to subject property held by the State or any of its local instrumentalities of government to special assessment, and the inquiry must be whether it has done so. The best discussion of the general subject of the exemption of public property from local assessment is found in 8 British Ruling Cases, note beginning at page 195.

After all, the question resolves itself into an interpretation of the latter clause of section 2710, quoted above. Did the Legislature intend thereby to subject all public property to local assessments, as well as the private property benefited by them? The strength of the position in favor of the board of education lies in the fact that the statute makes the cost of the assessment apportioned to the property a lien upon the property which may be enforced by its sale. It seems, therefore, contrary to public policy that such a lien should under any circumstances be given upon property which is

devoted wholly and strictly to the public use which has been endorsed and approved by the Constitution itself.

Mandamus would, I think, be the proper cause of action to enforce payment of this assessment by board of education if it is liable. It ought to be easy, however, to make a case agreed and submit it to the Court.

Very truly yours,

FRANK NASH,

Assistant Attorney-General.

OPINIONS TO STATE BOARD OF HEALTH

COUNTY BOARD OF HEALTH—HEALTH OFFICER

February 15, 1923.

DR. W. S. RANKIN, *Secretary, State Board of Health, Raleigh, N. C.*

DEAR SIR:—In reply to yours of February 14th.

This office in an attempt to interpret C. S., secs. 7067 to 7069, has held that the county health officer is a public officer, whereas, the county physician is simply an employee of the county. We think that section 7067 permits the county board of health to appoint either a county physician or a county health officer. If it does, however, appoint a county health officer, it has no authority to go further and appoint a county physician. If in a particular county there has been elected a county health officer and on account of the populousness of the county, the duties imposed upon him as said county health officer by section 7068 are so onerous that he cannot attend also to the duties of county physician, then in the opinion of this office the board of county commissioners of the county may employ a county physician to perform the duties defined in section 7069. The expression used in section 7067 is "The board of health may elect either a county physician or a county health officer." This necessarily places the authority in the alternative which would prevent it from electing both a county physician and a county health officer, in the opinion of this office.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTIES—FREE DENTAL TREATMENT

April 5, 1923.

DR. J. M. MITCHNER, *Director, Bureau, Medical Inspection of Schools, Raleigh, N. C.*

DEAR SIR:—We have considered carefully your letter of March 28th and have come to the conclusion that there is no legal reason why you should not present the proposition outlined in your letter to the various counties in the State. If they accept that proposition, it will be all right. We think, though, that you have no legal authority to compel the acceptance. If the Legislature had intended that the various counties should match the appropriation made by the State for the purpose of providing free dental treatment for as many of the school children as possible, it would have said so in the act.

So, after all, it is purely a matter of policy for you to determine whether you will make the proposition to the various counties.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY HEALTH OFFICER—VENEREAL DISEASES

May 17, 1923.

DR. W. S. RANKIN, *Secretary, State Board of Health, Raleigh, N. C.*

DEAR SIR:—In reply to yours of May 15th. Taking up your questions seriatim as propounded:

(1) In your opinion does a local health officer have the authority to detain and cause to be treated persons suspected or known to be infected with a venereal disease?

(A) The term used by you in the question, "suspected," should be qualified in the following way: "Persons whom he has reasonable grounds to suspect." So qualified, we answer your question "Yes." The qualification is necessary because neither the State Board of Health nor any of its agents has arbitrary authority in such cases. For their protection in suits for damages they must be able to show the court, if suit should be brought, that they had reasonable grounds for believing that the person whose liberty was interfered with had the disease which authorized this interference.

(2) When such a person or persons reside beyond the corporate limits of a town or city, is the proper official through which such process should be served the sheriff of the county?

(A) C. S., sec. 7193 must be construed in connection with section 7195. The latter section gives your board authority to make rules and regulations providing for the control and treatment of persons isolated or quarantined under the provisions of section 7193. It is declared that such rules and regulations shall be binding upon all persons affected by the article and shall have the force and effect of law. Section 7198 makes the violator of any provision of article 15 or any of the proper rules and regulations of the State Board of Health, etc., guilty of a misdemeanor. As we understand it, your Board has promulgated such rules. Under those rules the health officer himself acts. He notifies the person supposed to be infected of the fact, and requires him to conform to the rules and regulations. If that person either wilfully or negligently fails to comply with such rules, he is declared guilty of a misdemeanor by section 7198. Thereupon, it would be the duty of the health officer to take out a warrant against him from some justice of the peace and proceed to punish him. The warrant of the justice of the peace is directed to the sheriff or any other lawful officer of the county or township. Any officer in whose hands the warrant is placed is, of course, bound to serve that warrant. If he fails to do so, he may be punished under C. S., sec. 3936, if a sheriff, or generally under C. S., sec. 4384. We do not think that the sheriff is bound to obey the verbal order of the health officer, but only a process or other order from a court duly constituted.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATUTE—MATTRESS ACT OF 1923

January 16, 1924.

MR. H. E. MILLER, *Sanitary Engineer, State Board of Health, Raleigh, N. C.*

DEAR SIR:—You ask this office to give you an interpretation of the sanitary bedding act, Chapter 2, Public Laws of 1923, in the following particulars: Section 3 is as follows:

No person shall sell, offer for sale, deliver, consign for sale, or have in his possession with intent to sell, deliver or consign for sale, any article of bedding that has been used by or about any person having an infectious or contagious disease.

and the first clause of section 4 is as follows:

No person shall make or renovate any article of bedding unless all the material to be used in said remade or renovated bedding shall first be thoroughly sterilized and disinfected by a process approved by the State Board of Health.

and the concluding clause of section 5 is as follows:

That this act shall not be construed to prevent a person from making or having made any bedding out of materials furnished by said person for his or her own use, or to any person who does not make over six mattresses per week, provided said label is attached.

You inquire how far this concluding clause of section 5 limits the broad provisions copied above from sections 3 and 4. After a thorough consideration of the question, we, somewhat unwillingly, have arrived at the conclusion that a person who makes or has made bedding out of materials furnished by him for his or her own use is not within the act. We are further of the opinion that any person who does not make over six mattresses per week, even though those mattresses are made for sale, is not within the act except that he must put upon those mattresses so made by him the official label provided by section 5 of the act. The person who makes or has remade mattresses for his own use seems not to be within the evil which the act itself was intended to remedy, but the manufacturer of not more than six mattresses per week is making them for sale, and it is unfortunate that the General Assembly did not apply the provisions of sections 3 and 4 to such manufacturer, because though it is in a small way, he is in reality dealing with the public, and six mattresses improperly made each week may be a source of danger to that public and so would be within the evil which the act intended to remedy; but we know no rule of construction which would permit us to construe it otherwise than its plain words require.

Upon this you further ask whether or not in the opinion of this office local boards of health could make rules similar to those contained in sections 3 and 4 applicable to the maker of six or less mattresses a week. We think not, because the Legislature has dealt with the subject specifically and its manner of dealing is in effect a prohibition upon local boards to make such rules necessarily conflicting with this act.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITY WATER SUPPLY—UNITED STATES

January 19, 1924.

MR. H. E. MILLER, *Director, Bureau of Sanitary Engineering, Raleigh, N. C.*

DEAR SIR:—We have considered your letter of January 18th in connection with the letter of the mayor of Asheville to Dr. W. S. Rankin. Mayor Cathey states in his letter:

The city of Asheville is going to construct about a 60 acre lake on the Swannanoa River where the present Tourist Camp is located. In doing this we will back the water of the Swannanoa River up to within a few feet of where the sewerage now from Oteen Hospital empties into the Swannanoa River.

Manifestly, this is a dangerous situation with reference to the water supply of Asheville to be taken from this lake. Oteen Hospital, I understand, has many tuberculous patients being treated by the United States Government in this hospital, which is, of course, located on a reservation belonging to that government. We think that C. S., sec. 7125 is applicable to the situation. That section is as follows:

No person, firm or corporation or municipality shall flow or discharge sewage above the intake into any drain, brook, creek or river from which a public drinking water supply is taken, unless the same shall have been passed through some well known system of sewage purification approved by the State Board of health; and the continued flow and discharge of such sewage may be enjoined upon application of any person.

This section was declared to be constitutional in *Durham v. Cotton Mills*, 141 N. C., 615; *Durham v. Cotton Mills*, 144 N. C., 705; *Shelby v. Power Co.*, 155 N. C., 196; *Board of Health v. Commissioners*, 173 N. C., 250. Those cases also determine that it makes no difference as to the application of the statute, that sewerage had been discharged by the municipality or corporation into the stream long before it was adopted as a water supply for the city.

In the statute permitting the United States to acquire lands in the State, there is an express reservation to the State of North Carolina of authority to punish all violations of its criminal laws on any such tract of land. See C. S., 1919, Chapter 132.

We suggest, therefore, that under the general authority given the State Board of Health by the Statutes of North Carolina, you take the matter up with the United States Department of Health or whatever department is proper, and by doing so calling their attention to the conditions created by this action of the city of Asheville. They will probably coöperate with you in putting in some system of purification at Oteen Hospital which will be satisfactory to your department before its sewage shall be discharged into the Swannanoa River.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO STATE BOARD OF ELECTIONS

STATE PRIMARY—PRESIDENTIAL CANDIDATES

February 6, 1924.

STATE BOARD OF ELECTIONS, *Raleigh, N. C.*

ATTENTION OF MR. W. L. BEASLEY.

DEAR SIR:—You ask of this office an opinion as to the effect of certain amendments to the election law made by the General Assembly of 1923 upon the entrance of candidates for the Presidency into the State-wide primary. The law as it was before the amendment of 1923 is contained in C. S., sec. 6022. That section is broad, general terms requiring every candidate for selection as a candidate of any political party for any office provided to be voted for in any primary election to file notice of candidacy in the form provided by the statute at least six weeks before such primary is to be held.

This office in an opinion to Mr. Frank A. Hampton written April 16, 1920, held that under the law as it then was, proposed candidates for the Presidency were required to file notice of their candidacy under section 6022, although section 6023 did not provide any fees for filing such notice. The amendment of 1923, Section 13 of Chapter 111, Public Laws of 1923, instead of leaving section 6022 broad in its designation of the candidates who should file notice of candidacy, specifically mentions those who should file such notices, and candidates for the Presidency are not included in the list. This, then, is the difficulty which confronts the State Board of Elections in dealing with proposed candidates for the nomination for the Presidency.

After considering the matter carefully, we have come to the conclusion that this change in the law, standing alone, does not affect the former ruling of this office for the following reasons:

The amendment of section 13 of the Act of 1923 in effect substitutes a new section for section 6022 in manner and form as provided in the act. It being, however, an amendment to the primary election law, it must be construed in connection with the other provisions of the act which were left unmodified by the amendment. Now, section 6019 permits every voter at the coming primary to express by primary ballot his choice for the nominees of his party respectively for President and for Vice-President of the United States, and the last clause of this section is as follows:

Provided that the State Board of Elections shall make such other and necessary rules for carrying out the provisions of this article as may be proper, such rules and regulations not to be in conflict with the letter and spirit of this article.

Section 6030 declares that such elector wishing to participate in such primary election shall be permitted to vote for his choice for the nomination for President of the United States by name to be inserted in a ballot ar-

ranged therefor . . . by making a cross mark in a small square opposite the names of the respective candidates for whom he elects to vote. How, then, can the voter express this choice unless the State Board of Elections prepares a proper ballot through which the choice may be indicated, and how can the State Board of Elections know how to prepare this ballot unless formal notifications of candidacy have been filed by the proposed candidates? Section 6031 declares:

There shall be provided for each election precinct at the expense of the respective counties three ballot boxes labeled respectively "National Primary Box," . . . etc., in the first whereof shall be deposited all ballots for President and Vice-President of the United States and members of Congress.

This provision is mandatory in form and so is to be obeyed, and how can it be obeyed unless the candidates for the Presidency have filed notifications of candidacy at the proper time and ballots for various candidates for the Presidency are prepared by the State Board of Elections?

Construing, then, the amendment of 1923 in connection with the other provisions of the primary law in which it is incorporated, we are quite clear that any candidate for the Presidency who desires to participate in the primary must file his notification of candidacy with the State Board of Elections in manner and form as provided in the new section 6022. We find nowhere in the law, however, any provision which requires these candidates for the Presidency to pay the filing fees provided by section 6023.

So, notwithstanding the amendment of the statute, we think our former ruling is as applicable now as it was before the amendment.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CANDIDATES—EXPENSES

May 22, 1924.

JUDGE WALTER H. NEAL, *Chairman, State Board of Elections, Raleigh, N. C.*

MY DEAR SIR:—Your letter of May 19th, asking for an opinion of this office as to the date from which candidates for office must file their expenditures as required by law, is received. I know of no certain date that can be definitely fixed except the date on which the certificate of candidacy is filed with the State Board of Elections. This date I have understood, and do now understand, to have been heretofore ruled and generally accepted as the date from which a candidate must date his expenditures. Prior to the filing of the notice of candidacy, although it may be generally known that a candidate is in the running for a particular office, he has not taken the determinative step, to wit: the filing of the certificate of candidacy which under the statute makes him a candidate for the office.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO COMMISSIONER OF PUBLIC WELFARE

SAMARCAND—JUSTICES OF THE PEACE

December 7, 1922.

MRS. KATE BURR JOHNSON, *Raleigh, N. C.*

ATTENTION OF MISS EMMETH TUTTLE.

DEAR MADAM:—The question presented by you upon the case of Leila is difficult and we hesitate to express any opinion upon it without further consideration. Section 7334 seems to contemplate conviction of a crime before the girl or woman can be committed to Samarcand. After, however, the conviction, the State seems to assume a paternal relation to the convict. Its attitude toward her is not that of punishment, but of restraint in order that she may be cured of her physical and moral ills. That detention, however, is limited to three years. Thirty days detention would never accomplish this cure.

A justice of the peace by the State Constitution has only a restricted jurisdiction of all criminal matters arising within his county, where the punishment cannot exceed a fine of \$50.00 or imprisonment for thirty days. For this reason, we think that justices of the peace have not jurisdiction to commit a woman convicted before him of the offenses defined in C. S., sec. 7334 to Samarcand. We would, therefore, recommend that in all cases these girls be carried before city courts, recorder's courts or county courts, or superior courts having jurisdiction beyond that of a justice of the peace. The question is, however, not free from doubt, and in considering it, we have reread *State v. Lyon*, 93 N. C., 575, which in our opinion is not antagonistic to this view.

If it is possible to induce Leila voluntarily to act under section 7336 of the Consolidated Statutes, we would advise doing so. In all cases courts dealing with these women should issue a proper mittimus, committing them to the State Home and Industrial School for Girls and Women. They are not required to send the original papers, but should from them make out the commitment.

We return herewith the papers in the case.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

SUPERINTENDENT OF PUBLIC WELFARE—ABOLITION OF OFFICE

August 16, 1922.

MRS. CLARENCE A. JOHNSON, *State Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—You state that Stanly County has a population of about 27,000 by the census of 1920, and so is not a county in which under Chap-

ter 128, Public Laws 1921, a county superintendent of public welfare is required to be elected. By the provisions of that act it was optional with the board of commissioners, in counties having less than 32,000 population, to take part in the election of a county superintendent. At the proper time, the second Monday in July, 1921 the Stanly County board did attend the joint meeting with the board of education, and elected a county superintendent for two years and fixed his compensation, which under the statute is to be paid by the two boards, one-half, each. On the first Monday in August of this year the board of commissioners attempted to rescind their action of the previous year and announced that they would no longer participate in the payment of the superintendent's salary or his expenses. You ask us to rule upon the legality of this action by the board of commissioners. We think this board had no authority under the statute to adopt this order, before the second Monday in July, 1923. The term was for two years, and the superintendent could not be removed except for cause and this must be found at a joint meeting of both boards. The office could not be abolished during the term except by the same joint action.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JAILER—DISCIPLINE

August 22, 1922.

MRS. CLARENCE A. JOHNSON, *State Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—You asked this office to state fully whether or not the keeper of a county jail has in any way authority to discipline the prisoners confided to his care. The jailer in North Carolina is simply an employee of the sheriff of the county whose jail he keeps. He is not a public officer but in all his acts in the scope of his authority represents the sheriff. Our Court has held with reference to county convicts sentenced to hard labor upon the public roads that they are not subject to flogging by the officer having them in charge. Section 1361 of C. S., authorizes the board of commissioners of a particular county to enact all needful rules and regulations for the successful working of convicts upon the public roads. This, of course, does not confer any authority upon the county commissioners to make rules and regulations even for convicts whose punishment is confinement in the county prison, so of course, much less can they make rules and regulations for the discipline of prisoners untried and imprisoned in the county jail temporarily until trial on account of their inability to give bond. The sheriff himself has no authority to discipline prisoners of either of the latter classes. It is very clear, then, that when the jailer goes beyond the necessary measures for preventing the escape of prisoners committed to his care, or the necessary precautions for his own safety, he offends against the law. In no sense and in no way has he authority to discipline the prisoners committed to him as an employee of the sheriff for safe keeping.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MATERNITY HOME—LICENSE

September 20, 1922.

MRS. CLARENCE A. JOHNSON, *State Commissioner of Public Welfare, Raleigh, N. C.*

ATTENTION OF MISS TUTTLE.

IN RE: *Maternity Home of*

DEAR MADAM:—We have considered the letter and other papers left with us by Miss Tuttle on yesterday and return them herewith.

Sub-sections 4 and 5 of Section 5006 of C. S., requires the State Board of Charities and Public Welfare to inspect and make report on maternity homes and to require from said homes such information as it may desire. The Board may license such home if upon investigation it believes it is needed for the public good and is conducted by a reputable person. The Board also is permitted to revoke such license when conditions are such as to justify such revocation. The act is unfortunately silent in imposing any penalty upon a person conducting such maternity home without license. It is further defective in not defining what a maternity home is. We are inclined to construe the act, however, as permitting the State Board to use such means as it may deem effective to close a maternity home not duly licensed by it. We suggest that in both the particulars just mentioned the act should be amended at the coming session of the General Assembly.

At present we know no provision of law which would punish a person who receives young girls into her home that they might there give birth to illegitimate children, provided, of course, nothing is done to offend against the statutes which punish abortions or attempted abortions.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SAMARCAND—INSANE INMATE

October 3, 1922.

MISS EMITH TUTTLE, *State Board of Charities and Public Welfare, Raleigh, N. C.*

IN THE MATTER OF *L. L.*

DEAR MISS TUTTLE:—The procedure to which Miss McNaughton can resort is that contained in Article 3, Chapter 103 of the Consolidated Statutes of 1919. The Clerk of the Superior Court of the county in which Samarcand is located has the necessary blanks and papers upon which to determine the sanity of the girl, and if she is insane, to commit her to Morganton State Hospital, as she is a resident of that district and has a settlement in either Catawba or Burke County. The Clerk of the Superior Court referred to has jurisdiction to act in the matter under Section 6204 of the Consolidated Statutes. Section 6205 prescribes how the expenses of such commitment shall be paid. There is a section of the Consolidated Statutes, 6238, which requires all convicts becoming insane after commitment to the State's prison,

to be sent to the State Hospital for dangerous insane at Raleigh. We do not interpret this section, however, as applying to L. L.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JURISDICTION

January 2, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

ATTENTION OF MISS TUTTLE.

DEAR MADAM:—It appears from the letter of Mr. Samuel E. Leonard to you that the juvenile court of Wilson County had taken jurisdiction of a four year old girl whose mother had deserted her some time ago. This child was committed by the juvenile court to a lady resident in Wilson, to await further orders by said court. It seems that the mother of the child has a sister who, with her husband, lives in Nash County. The mother of the child had previously attempted suicide and was in the hospital in Wilson when this sister in Nash County came to Wilson to see her. The Nash County sister interceded with the court to permit the child to go with its mother to the sister's home in Nash County. The court after considering the matter, permitted this to be done, but required the mother of the child, her sister and sister's husband to execute a \$250.00 bond for the production of the child and for their appearance before the court on January 4, 1923.

It turned out that after these parties had taken the child to Nash County, the aunt of the child applied to the clerk of the superior court of that county for letters of adoption and those letters were issued to this aunt. Upon this, you inquire what is the situation of the juvenile court in Wilson County with reference to this transaction. It is declared in C .S., sec. 5039:

The superior court shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within their respective districts.

Among other children who are committed to the care of the juvenile court are those who are dependent upon public support or who are destitute, homeless, or abandoned, or whose custody is subject to controversy. Section 5040 creates the juvenile courts in the various counties in the State and confers jurisdiction upon the judges of these courts in cases in which the child or children concerned reside in his county or are at the time within such county. It is clear, then, that this child was in the custody of the juvenile court of Wilson County and being such, the court had authority to permit the child to be carried over into Nash County upon the execution of the bond conditioned for its return on the 4th of January. Section 5045 expressly declares that any child who has been taken into custody or pending the final disposition of the case, may be released into custody of a parent or other person having charge of the child or other person appointed by the court, to be brought before the court at some designated future time. That is what was done in this case.

Consequently, the juvenile court of Wilson retains jurisdiction over this child thus permitted to be taken to Nash County. We are quite clear that the adoption of this child in Nash County under the circumstances in every particular was absolutely void. C. S., sec. 182, confers jurisdiction upon the clerks of the court to issue letters of adoption only when the child so adopted resides in such county. In this case, neither the child nor its mother was in any sense a resident of Nash County. This being true, the so-called letters of adoption in Nash County may be collaterally impeached and so cannot stand in the way of the action of the juvenile court in Wilson County in forfeiting the bond executed for the return of the child and taking such further proceedings to bring it within its jurisdiction as it may be advised to take.

Clerks of the superior court have jurisdiction over the estates of deceased persons only when the deceased person was domiciled in the county of such clerk. The courts have held that this domicile is jurisdictional and that the action of the clerk in assuming jurisdiction over estates when the deceased persons were not domiciled in his county is absolutely void. *Reynolds v. Cotton Mills*, 177 N. C., 412. The same principle applies in this case, in the opinion of this office.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

COUNTY SUPERINTENDENT—ELECTION

August 28, 1923.

MRS. KATE BURR JOHNSON, *Commissioner, State Board of Charities and Public Welfare, Raleigh, N. C.*

DEAR MADAM:—In reply to yours of August 28th.

We are very sorry you are having trouble on account of the situation in Wayne County. The statute, chapter 128 of the Public Laws of 1921, in referring to the election of county superintendent of public welfare, declares:

No one so elected shall begin the work of this position until he shall have received a certificate of approval of his fitness from the State Board of Charities and Public Welfare; and in case such approval is not received, the two boards shall, upon receiving notice thereof, proceed immediately in like manner to elect another person.

In a letter written to you August 20, 1921 (Biennial Report, 1921-22, pp. 187-188), in reply to a request from you to interpret the extent of this veto power, we wrote:

It seems to us that the statute itself is specific in this regard: "The person elected county superintendent of public welfare shall be qualified by character, fitness and experience to well discharge the duties thereof." It is a very important office and the whole purpose of the act may be frustrated in a particular county by the election of an improper, unfit and inexperienced

person. The determination of fitness is placed by the Legislature wholly in the power of the State Board of Charities and Public Welfare. We do not interpret the word "experience" as requiring that the person elected should have been an incumbent of the office before, but as requiring that person to have manifested his sympathy with the general purposes of the act by his previous experience.

If, therefore, the State Board of Charities and Public Welfare has refused to approve the election to the office of county superintendent of public welfare of a particular person, then, of course, under the statute the election is void and the act itself requires the boards to meet again in joint session and elect some one else to the office. This seems to be the plain meaning of the law. As the situation is now in the County of Wayne, the office of county welfare superintendent is vacant, and no one can assume the duties of the office without another election. This is the legal situation, but we know no remedy for it except an effort to accommodate the differences between the Board of County Commissioners of Wayne County and the Board of Education of that county in some way.

We think your Board has no authority to appoint such county superintendent under the circumstances.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JURISDICTION

February 27, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—We have considered the letter of Mr. Leonard to you of date February 26, 1923. The following seem to be the facts upon which you desire a ruling from this office:

Floyd Sutton, an abandoned child, was taken by his uncle, Mr. Charles Snipes, about four years ago and has been kept by him since that time. On January 29, 1923, Jack Allen, who married Floyd's sister about two years ago, came up from Pitt County and went to the school in Wilson County where Floyd was being educated, took him and carried him to his (Allen's) home in Pitt County. Allen was charged with abduction in a warrant served upon him in Pitt County. At the preliminary examination probable cause was found and he was bound over to court. He gave bond, went back to Pitt County and filed a petition with the judge of the juvenile court of Pitt County for the custody of the child.

You ask whether or not in the opinion of this office the judge of the juvenile court of Pitt County had jurisdiction over the child and authority to dispose of his custody. We think it quite clear that he did not have such jurisdiction. Section 5040 of the Consolidated Statutes provides:

The clerk of the superior court of each county in the State shall act as judge of the juvenile court in the hearing of cases coming within the provisions of this article, in which case the child or children concerned therein reside or are at the time within such county.

It is under the emphasized clause that the judge of the juvenile court of Pitt County claims that he had jurisdiction. That, however, assumes that the child was legally in the county. Floyd Sutton in this case, being twelve years old and an abandoned child, had resided in Wilson County certainly for four years. To claim that he was in Pitt County at the time that the clerk of the court attempted to assume jurisdiction over him is to disregard the fact that he was illegally and against his will carried to Pitt County. For the juvenile court judge of Pitt County, then, to assume jurisdiction of this child is to prejudge the case against Allen now pending in the Wilson County Superior Court under a charge of abduction. We think he has no authority under section 5040 or any other section in Chapter 90 of the Consolidated Statutes, to assume jurisdiction over a child which *prima facie*, at least, is in Pitt County against his will.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INFANTS—TRAINING SCHOOL

March 20, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—You state that there are in the Caswell Training School at Kinston two or three infants born of its inmates, and you inquire what power your Board has over the disposition and care of these children.

It seems that sub-section 3 of section 5006 of the Consolidated Statutes gives your Board extensive power and authority in dealing with and promoting the welfare of dependent children. This, then, would be the source of your authority in dealing with these children. Of course, any exercise of this authority except in conjunction with and under the advice of the Superintendent of the Caswell Training School would result in confusion, to say the least of it. If, then, any one of these children has a helpless mother without any means of her own or of her family which would be available for the child, it would be well for you to consult Dr. McNairy as to the disposition of the child. Whatever cost would accrue in dealing with the question would legitimately be a charge against the county of the settlement of the mother. The fact that she is confined in the Caswell Training School would not change her settlement and her settlement under such circumstances would be the settlement of the infant child.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JURISDICTION

March 7, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—Through Mr. Brown of your Department you submit the following question to this office:

A, a juvenile delinquent, is brought before a juvenile court charged with the larceny of \$5.00. The father of the child is brought into court also under

C. S., sec. 5044. After an investigation the juvenile court found that the child had stolen the \$5.00; can the court under such circumstances make an enforceable order that the father of A shall return the \$5.00 stolen to the person from whom it was stolen?

We think the juvenile court cannot enforce this order against the father if he refuses to comply with it. If he should refuse to comply, there is no machinery provided by the general law or the juvenile court to enforce the judgment against him. Of course, all properly constituted fathers would be glad to conform to the order of the court under such circumstances, but we know no rule of law which would compel the father, who had taken no part in the theft, either in instigating it or in receiving the fruits thereof, to restore the stolen property.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ADOPTION—JURISDICTION

March 21, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—In reply to your letter of March 21st.

You state that there are several children in the Caswell Training School that the superintendent and yourself have agreed to have adopted out. You wish to know what clerk has jurisdiction to issue the necessary papers. The Clerk of the Superior Court of Lenoir County in which the institution is situated or the clerk of the superior court of the county in which the mother has a settlement.

The expression used in the statute, C. S., sec. 182, is: "Any person desiring to adopt any minor child may file a petition in the superior court of the county wherein such child resides." The county of the residence of a minor child is that of its mother, and the mother of one of these children being an inmate of the Caswell Training School, has a legal residence only in the county from which she comes. This is the technical rule.

To deal with these children in the Caswell Training School, though, with the mother under wardship herself, it may be better at the risk of disregarding strict accuracy, to apply to the clerk of the Superior Court of Lenoir County, in which the Caswell Training School is located, for the letters of adoption. If this course is adopted, we know no one who has any right to complain at the jurisdiction so assumed by the Lenoir County clerk.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JURISDICTION

April 13, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Welfare, Raleigh, N. C.*

DEAR MRS. JOHNSON:—In reply to yours of April 10th.

In your letter you ask a number of questions, and we take them up seriatim.

(1) When a recorder is hearing juvenile court cases, he being also a properly constituted judge of the juvenile court, does he have authority to fine parents, acting in the capacity of a recorder, and at the same time make a disposition of the case of a child, acting in the capacity of the juvenile court judge? In other words, can a recorder handle both parents and child, and dispose of both at one hearing?

We cannot answer this question categorically "Yes" or "No" because there are many limitations to such answer which must be stated, that it may be proper. On February 25, 1922, we wrote you (biennial report 1921-22, p. 189):

The fundamental reason why the juvenile court act may adopt summary remedies and enforce them by summary proceedings is that the delinquent children are wards of the State. If the Legislature had attempted to confer jurisdiction upon the juvenile court to deal in a summary way with adults, where their acts amount to crimes under the general law, such attempt would have been, we think, unconstitutional.

The reason that such act would have been unconstitutional is that the Constitution itself declares that every person charged with a crime shall be informed of the charge and have an opportunity to confront his accuser with testimony in his behalf. If, therefore, a recorder is likewise judge of the juvenile court in the town where his court is located, he may proceed against the children of the class defined in the act under the juvenile court act. If the parent (or parents) of a delinquent child has offended against C. S., sec. 5057, which punishes neglect by parents as specified in the section as a misdemeanor, then the recorder has to proceed against that parent, issuing criminal process, giving him an opportunity to defend the charge just as he would in any other case. In this he would be acting as the judge of a criminal court with all the consequences that ensue from the exercise of such function. Dealing with the child, though, he would be acting as judge of the juvenile court. If, therefore, he deals with the child and the parent at the same time, this must be a coincident, because he should use different proceedings in each case and exercises different functions in each case.

(2) In the City of Rocky Mount the authorities have established a city juvenile court, as they have a right to do under C. S., sec. 5062. Upon this you ask:

Does this juvenile court judge have authority to handle adult cases, in like manner as the city recorder?

Excluding cases where he makes proper orders with reference to the control and custody of delinquent children, which orders he may enforce against adults if properly made, through the exercise of the power of the court when that exercise is proper under C. S., sec. 5046, we think this judge of the juvenile court has no more authority than that conferred upon other juvenile courts. He cannot issue criminal warrants against adult persons and try them as though he was sitting as a criminal judge. That must be left to the criminal courts.

(3) Does the judge of a juvenile court have authority to order a child to be flogged by the police, and, if so, under what conditions?

To this we answer emphatically, *No*. On May 27, 1921, the question was put to this office as to whether or not the juvenile court could order a parent to flog a delinquent child in the presence of the court, to which we replied as follows:

It may be that sub-section 5 of C. S., sec. 5047 would permit the juvenile court, where circumstances are such as to require it, to have the father thrash the boy in the presence of the court. If, however, the court has this authority, it seems that it would be more honored in the breach than in the observance. The court has authority to commit a child to the custody of a parent. If the parent is one proper to have this authority, he would accomplish more by administering the punishment privately than he would by outraging the sense of justice of this little irresponsible arab by a thrashing in public. It is an exceedingly difficult situation which can be dealt with only by wise forbearance and full consideration for the point of view of the boy, accompanied by firmness where such firmness is required.

Much more, then, do we think that it would be an outrage upon the delinquent child for the court to have him flogged publicly by a police officer, or privately by a police officer. The juvenile court act is based upon the fundamental idea that the proceedings allowed therein are not for the punishment of the delinquent child, but for his protection and training. It is the State acting as a parent when dealing with them. We are very clear, then, that these courts should never in any instance require these delinquents to be punished by flogging, administered by a police officer.

(4) What are costs in these juvenile court cases?

The statute is wholly silent as to this. It nowhere says that officers serving the processes of such court shall be entitled to fees similar to those received in other courts. Indeed, C. S., sec. 5046 declares:

The sheriff or other lawful officer of the county in which the action is taken shall serve all papers as directed by the court, but the papers may be served by any person delegated by the court for that purpose.

The statute thus leaves the question of cost up in the air, so to speak. On February 21, 1920, we attempted to deal with this question for Mr. Beasley, the former Commissioner of Public Welfare. See opinion at page 149 of the biennial report for 1918-1920. Mr. Beasley in a letter to this office assumed that the juvenile court act provided no fees for the service of the processes of these courts, and upon that assumption we acted. It is unnecessary to quote that opinion in full as you have a copy of the report.

It is a general rule that public officers for public service are entitled only to those fees specifically or by necessary implication provided by statute, and it is very clear that the Legislature may impose other duties upon existing public officers without providing any compensation for the performance of the duties. If it should be suggested, however, that such officers

by necessary implication are entitled to the fees provided for the service of processes of other courts, in serving processes of juvenile courts, we admit that there is force in this suggestion. The difficulty we have, however, if this should be assumed, is that it is not possible to determine with absolute definiteness what those fees should be in a particular case. The statute itself seems to contemplate that the probation officer should serve these papers, but if not, that they should be served by the sheriff or other proper officer without compensation. We admit that this conclusion is subject to very serious doubt, which can only be solved by a decision of the court.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUVENILE COURT—JURISDICTION

August 30, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—You inquire of this office whether or not a juvenile court has jurisdiction to put an adult upon probation. We think it very clear that it has not. C. S., sec. 5050, is so drawn as to assume that an adult could be put upon probation. No where else in the statute, however, is there any machinery providing for such probation. The terms "or adult" in the section were no doubt incorporated in it through inadvertence and so do not confer authority in the absence of other legislation upon the juvenile court to put an adult upon probation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MOTHERS' AID ACT

September 18, 1923.

MISS EMITH TUTTLE, *State Board of Charities and Public Welfare, Raleigh, N. C.*

DEAR MISS TUTTLE:—You ask us to interpret the Mothers' Aid Act, Chapter 260 of the Public Laws of 1923, especially with reference to the duties of county authorities thereunder.

The boards of county commissioners of the several counties in the State are authorized in their discretion to make an allowance to any eligible mother for her support, where she is left with a child or children under fourteen years of age. Section 4 of the act declares what mother shall be eligible to this aid. She must be

(a) A mother of a child or children under fourteen years of age;

(b) A resident of the State of North Carolina for three years and a resident of the county for one year preceding;

(c) She must be possessed of sufficient mental, moral and physical fitness to be capable of maintaining a home for herself and child or children, and prevented only from lack of means;

(d) She must be either a widow or divorced or deserted. In the latter case it must be impossible to require the husband to support her. If the husband has not deserted her but is mentally or physically incapacitated to support his family, or if he is confined in any jail, and assigned to work the roads of any county or in any penal or eleemosynary institution, she may be aided, provided no relative is able and willing to supply this aid. If the mother is aided partially by any relative or charitable organization, the board of county commissioners may take this into consideration, and make an additional allowance to her to supplement the partial allowance of relative or charitable organization.

The existence of these essential facts to the aid of a mother must be determined by an investigation of the situation with a view of ascertaining these facts by the county superintendent of public welfare. If the board deem it wise, it may require this report to be presented to and approved by the judge of the juvenile court in that county before acting upon it. The county superintendent of public welfare must make his report to the county commissioners in duplicate, one copy of which shall be forwarded at once, with the action of the board of county commissioners endorsed thereon, to the said State Board of Charities and Public Welfare, and one filed by the board of county commissioners with its record in the case.

The amount of the allowance to the woman after the investigation by the county superintendent may be determined by the county board of charities and public welfare, and that body shall recommend to the board of county commissioners the amount of the appropriation which they deem necessary for the support of the mother and children under fourteen years of age. This recommendation, however, is not conclusive upon the board of commissioners. The board of commissioners may not exceed \$15.00 for one child, \$10.00 additional for the second child and \$5.00 additional for the third child or any excess of three, per month. The total amount, however, shall not exceed \$40.00 except in extraordinary cases.

These, stated shortly, are the provisions of the act governing the relations of the boards of county commissioners to mothers' aid in the counties over which they preside. What, then, are the relations of the State Board of Charities and Public Welfare to the administration of the Mothers' Aid Act? This body is given general oversight over the administration of the act with a view to making it uniform throughout the State. It is to furnish all necessary blanks and give such advice and help as it can, in order to aid in entirely securing its purpose. That is one reason why the Legislature requires the report of the county superintendent of public welfare upon a particular case to be forwarded at once to the State body. Upon receipt of this report, with the action of the board of county commissioners endorsed thereon, the State Board shall at once notify the county board of its approval or disapproval, and the State Board may suggest additional investigation for the consideration of the board of county commissioners. The approval or disapproval of the State Board, however, affects only the participation of the State of North Carolina in this mother's aid. If the State Board should disapprove the grant of the aid by the county to the particular mother, this disapproval does not in any way affect the validity of the grant by the county to the mother. The act contemplates that the county shall

pay this allowance for three months of what is the fiscal year of the State. At the end of each fiscal quarter, in cases which have been approved by the State Board of Charities and Public Welfare, the treasurer of the county wherein aid has been granted shall furnish an itemized statement in each case of the amounts paid by the county during the preceding fiscal quarter. This statement is to be verified by oath by the treasurer. When the State Board receives this amount, it shall certify it to the State Treasurer, whereupon the State Treasurer shall immediately make out and forward to such county treasurer his voucher for one-half of the total amount certified as having actually been paid out by the county during the preceding fiscal quarter.

A difficulty presents itself here, arising from the fact that appropriations made by the General Assembly to be paid annually are not available until the succeeding fiscal year commences. For instance, an annual appropriation made by the General Assembly at its regular session in 1923 is not available until after July 1, 1923, unless in the act in which the appropriation is made it is made definitely payable sooner. The General Assembly for the Mother's Aid Act appropriates \$50,000 per year for the purposes of the act, to be apportioned among all the counties on a per capita basis. If any particular county does not avail itself of its proportionate share of the appropriation during the current fiscal year, the balance of this proportionate share falls back into the General Fund of the State Treasury. It is apparent from this that in the administration of the law the State Board has no funds available to refund to the particular county one-half of the sum paid out by it during the preceding fiscal quarter for mother's aid until the appropriation becomes available after July 1st.

We are asked to determine whether or not this treatment of appropriations by the State in any way limits the power of the various counties to make their own appropriations for mother's aid. We think it limits the power of the counties only to this extent: that they can obtain from the State no money under the statute except for the fiscal quarter beginning May 1, 1923, and when all the requirements of the statute as above set out are strictly complied with.

This is the only way that we can give effect to section 10 of the act—"That this act shall be in force from and after its ratification."

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COMPULSORY EDUCATION ACT

November 14, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MRS. JOHNSON:—We have considered the subject presented by Mr. E. J. Coltrane's letter to you of November 13th, and return that letter herewith.

It seems that Mr. Coltrane confuses two subjects in his suggestion in regard to the compulsory education law. The Constitution of North Carolina and the general school law contemplates the provision of an education for every

child in the State of North Carolina between the ages of six and twenty-one years. When, however, the General Assembly comes to deal with the compulsory education law, it makes the period during which the child *must* be sent to school run from seven years of age to fourteen years of age. As a consequence, the parent or guardian or person having charge of a child under seven years of age is not criminally liable for not sending it to school. The same may be said with reference to the parent, guardian or person having charge of a child over fourteen years of age. If the attendance officer, then, instituted a prosecution against a parent who did not send a child under seven years of age to school, that prosecution must necessarily fail. It is likewise this in relation to a parent of a child over fourteen years of age. The State Board of Education is given authority to make rules and regulations to secure the enforcement of the compulsory attendance law, but this authority does not extend so far as to permit the State Board to require children under seven years of age and over fourteen to be sent to school.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY CONVICTS—HIRING OUT

December 6, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

ATTENTION OF MR. ROY M. BROWN.

DEAR SIR:—In reply to your letter of December 4th.

It seems that at the September term of the Superior Court of Watauga County, Judge T. B. Finley presiding, eight convicts were sentenced to the county jail, to be assigned by the county commissioners to work on the roads of any county with which they could make arrangements. The board of county commissioners of Watauga County found no county which was willing to take these prisoners and work them under the order of the Court. The chairman of the board of Watauga County and the sheriff then had a conference with Judge Finley, who agreed that the prisoners might be leased to a firm of contractors, and they were leased to Stearns Brothers, Inc., to be worked by them in Iredell County. There was no change made in the record of the Superior Court of Watauga County of the judgment upon conviction of these prisoners.

As C. S., sec. 1358, puts all convicts hired or farmed out by the county under the supervision and control of the sheriff, or his deputy, of the county in which they were convicted and imprisoned, the sheriff of Watauga County deputized two employees of Stearns Brothers to act for him in supervising and controlling the convicts so hired to Stearns Brothers, Inc. Upon this statement, you ask the ruling of this office upon the following questions:

(1) Does the authority of county commissioners to hire out prisoners extend to the hiring of groups of prisoners to individuals or to corporations?

To this we answer, Yes—subject, however, to the answer to the next succeeding question.

(2) May groups of prisoners be so hired by the consent or order of the Judge of the Superior Court?

C. S., sec. 1356, in its concluding clause, bases the authority of the board of county commissioners to hire out convicts entirely upon the judgment of the Court which sentences these convicts. That judgment must in express terms so authorize the county commissioners to hire out these convicts.

(3) May prisoners thus leased to an individual or corporation be placed in another county than the one in which they were convicted?

The answer to this question is not free from difficulty, but we think that a proper interpretation of C. S., sec. 1358, would allow this. That section is as follows:

All convicts hired or farmed out by the county or other municipal authorities shall at all times be under the supervision and control, as to their government and discipline, of the sheriff or his deputy, of the county in which they were convicted and imprisoned, and the sheriff, or his deputy, shall be deemed a state officer for the purpose of this section.

The statute probably had in mind this, as well as the arrest of an escaped convict, in making the sheriff or his deputy a State officer for the purpose of that section.

(4) Can the sheriff of one county appoint as his deputy a citizen of another county to serve outside his own county?

The answer to question 3, we think, answers this. So far as these prisoners are concerned, the sheriff is a State officer and may deputize a person in another county to supervise and control these convicts.

(5) If a prisoner leased to a corporation gives bond to the corporation for his good conduct—in case of the escape of the prisoner, what protection has the public when the corporation has not given bond for the safe keeping of the prisoner, and it has entered into no specific contract in this respect.

The statute which permits the hiring out of these convicts does not contemplate a bond for the safe keeping of the prisoners in express terms, though the board of county commissioners may in their discretion require a bond of the hirer. The authority of the sheriff to arrest an escaped convict anywhere in the State under C. S., sec. 1358 meets this condition, and section 1357 imposes upon the person hiring the convicts the duty to prevent their escape.

You will observe that we have not passed upon the question as to the authority of the Judge to change his order after the term in which it was made had expired by limitation. It is exceedingly doubtful whether he would have such authority. See *State v. Bennett*, 93 N. C., 503; *State v. Sanders*, 111 N. C., 700; *State v. Kinsauls*, 126 N. C., 1095. We are assuming, therefore, in this letter that the order was properly made permitting the county commissioners to hire out these convicts.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

CITY LOCK-UP

December 10, 1923.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—It seems that the so-called town of Duke, containing a population of about two thousand, is an unincorporated village. The Board of county commissioners of Harnett County has ordered the township of Duke to construct a new guard house. Thereupon, application was made by Mr. I. R. Williams, attorney, to the State Board of Health under C. S., sec. 7713, for directions in regard to the method of construction of this guard house. The object of this section is to secure the sanitary and hygienic welfare of prisoners confined in such prison or lock-up. It specifically mentions any place of confinement for city prisoners. It is more specific than C. S., sec. 5008. The latter section gives the State Board of Welfare power to inspect county jails, county homes, and all prisons and prison camps and other institutions of a penal or charitable nature. When, however, it comes to deal with new jails, its declaration is as follows:

The plans and specifications of all new jails and almshouses shall before the beginning of the construction thereof be submitted for approval to the State Board.

Section 5008 seems to deal solely with county prisons and county almshouses, and does not seem to be broad enough to include the lock-up of a city with reference to the erection of a new lock-up. It does give the Board authority to inspect them after they have been built.

With the law in this unsatisfactory condition, we suggest that Mr. H. E. Miller of the State Board of Health consult with your Department as to the plans and specifications for this jail and the two Departments act jointly in furnishing the authorities at Duke with these plans and specifications.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

INDETERMINATE SENTENCE—MINIMUM TIME

May 15, 1924.

STATE BOARD OF CHARITIES AND PUBLIC WELFARE, *Raleigh, N. C.*

ATTENTION OF MR. ROY M. BROWN.

DEAR SIR:—Your letter of May 12th is received. You ask the construction of this office as to the proviso in section 7738 of the Consolidated Statutes, to wit: "Provided that a prisoner has served the minimum time to which he was sentenced after allowing credit for good behavior as authorized by law." In my opinion the minimum time does not include deductions for good behavior. The good behavior of the prisoner determines his term of service above the minimum time.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

CITY WELFARE DEPARTMENT

June 13, 1924.

MRS. KATE BURR JOHNSON, *Commissioner, Raleigh, N. C.*

ATTENTION OF MR. ROY M. BROWN.

DEAR SIR:—You propound to this office a series of questions to each of which we append the answer as follows:

(1) Can a city establish a department of public welfare independent of the county board of charities and public welfare and the county superintendent of public welfare?

We have found nowhere any authority given by statute to cities and towns of the State to establish city boards of welfare except C. S., sec. 5018. That section contemplates joint city and county welfare work. Consequently, the answer to this question, in the opinion of this office, is "No."

(2) What would be the legal status of a city department of public welfare in relation to the county department?

If the city department is established under section 5018, unquestionably it would be under the supervision of the county board of charities and public welfare. If, however, the city has specific charter authority to establish such a board, that charter authority would control in its establishment.

(3) Could a city probation officer carry on his work entirely independent of the county superintendent of public welfare?

C. S., sec. 5049, declares in express terms: "The county superintendent of public welfare shall be the chief probation officer of every juvenile court in his county, and shall have supervision over the work of any additional probation officer which may be appointed." Section 5062 expressly puts assistant probation officers appointed by the governing bodies of cities under the general supervision of the chief probation officer of the county and the county superintendent of public welfare is that chief probation officer.

(4) Can the city school attendance officer carry on his work independent of the county superintendent of public welfare?

The county superintendent of public welfare is made by section 5017 the chief school attendance officer of the county. Section 5760 gives special attendance officers, paid out of town or city funds, full authority to prosecute for violations of the compulsory attendance law. This seems to give them independent authority in the matter of enforcing the attendance of children upon the schools.

(5) Is there any law as to the auditing of county finances that covers the expenditure of the county superintendent of public welfare?

Chapter 236 of the Public Laws of 1921 gives the State Auditor the authority, and imposes upon him the duty to examine the accounts of all counties and county officers receiving or disbursing public funds. This would necessarily include in it authority to audit the accounts of county superintendents of public welfare if they receive or disburse public funds. Even if they do not receive or disburse public funds, the audit of the ac-

counts of the receiving and disbursing officer of the county would necessarily include an audit also of his accounts.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITY WELFARE DEPARTMENT

June 23, 1924.

MRS. KATE BURR JOHNSON, *Commissioner of Public Welfare, Raleigh, N. C.*

ATTENTION OF MR. R. M. BROWN.

DEAR MADAM:—It seems that the City of Durham and the County of Durham have entered into an arrangement under C. S., sec. 5018 with the county commissioners of Durham County to consolidate the public welfare work of the city and county. The city council of Durham now has only one representative on the county board of public welfare, and you inquire of this office in what way under the statute the city may have a fairer representation upon the county board of welfare?

It is very plain that the number of the county board of welfare cannot be enlarged by any agreement between the city council and the board of county commissioners, section 5014 expressly fixing the number of members of the county board of charities and public welfare at three. As an administrative question purely, it seems that the city of Durham so largely overbalancing the rest of Durham County in the taxable value of its property and the amount of taxes paid by it, ought to have two representatives upon this county board. It is suggested that it may be possible to induce one of the members out of the city to resign in order that the State Board may fill the vacancy by the appointment of another member residing in the city.

We think that section 5018 is largely permissive in authorizing the city to consolidate its public welfare work with that of the county. This being true, and the City of Durham occupying with reference to the taxable value of property in the city as compared with that out of the city, would have a right to demand an account of the money appropriated by it to pay the expenses of the consolidated work. This section, however, is so limited by its terms that we think that the city council would have no authority to limit the power of the county board of charities and public welfare in the expenditure of the funds so appropriated. It is expressly declared that the consolidated work is to be under the authority and supervision of the county board of charities and public welfare.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

REMOVAL OF MEMBER OF COUNTY BOARD

July 25, 1924.

MRS. KATE BURR JOHNSON, *State Commissioner of Public Welfare, Raleigh, N. C.*

DEAR MADAM:—You ask the opinion of this office upon the authority of the State Board of Charities and Public Welfare to remove a member of the

county board of charities and public welfare without assigning any cause for removal under Consolidated Statutes, sec. 5014. The last clause of that section is as follows:

The State Board shall have the power at any time to remove any member of the county board.

This, standing alone, will give your board the power of removal at its pleasure. It is a principle at common law that when a particular executive board is given authority to appoint officers without the term of such officers being fixed, said board necessarily has authority also to remove such officers without assigning cause. This common law doctrine, however, yields to the will of the Legislature when a specific term is fixed by the Legislature for which the officers shall be elected by an executive board. Where there is such fixed term and the statute is silent as to the grounds of removal, we think the better rule is that the executive board can remove only for cause assigned affecting the efficiency of the officer so elected by them for a specific term.

At any rate the matter is so doubtful under the statute, section 5014 when construed in connection with section 5015, that we think the wiser course would be to attempt such removal only when sufficient cause can be assigned for it, which cause affects the usefulness of the particular officer to be removed.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

JUVENILE COURT—JURISDICTION

August 27, 1924.

MR. ROY M. BROWN, *Director, Bureau of Institutional Supervision, Raleigh, N. C.*

DEAR SIR:—In reply to yours of August 26th.

You put this case in your letter: A girl under sixteen years of age was sent by the juvenile court of Person County to the Mecklenburg County Industrial Home for Women, for a definite number of months. Some time after she was committed to the institution she attempted to escape and at another time attempted suicide by drinking wood alcohol which she found in the institution. In each case her sentence was lengthened by the institution, and a third time for reasons unknown several days were added. In the meantime the family, now living in Vance County, became alarmed for the safety of the girl and appealed to the county superintendent of public welfare. She satisfied herself that the welfare of the girl demanded her removal from the Mecklenburg County institution. Upon her recommendation the judge of the juvenile court of Person County reviewed the case and modified his judgment by ordering that the girl be returned to Vance County under the supervision of the superintendent of public welfare. The Mecklenburg institution refused to release the girl.

Upon this, you inquire whether or not the judge of the Person County juvenile court has power to modify his original order as indicated. If so, what should have been the order of procedure in this case.

The last clause of C. S., sec. 5039, in connection with the first clause of section 5054 answers the first question. The clause from section 5039 material to the discussion is as follows:

When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purpose of this article during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interests of the State.

The clause from section 5054 is as follows:

Any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of such child, except that a child committed to an institution supported and controlled by the State may be released or discharged only by the governing board or officer of such institution.

It is evident from this that under the circumstances surrounding the commitment of the child to the Mecklenburg Industrial Home for Women, the juvenile court of Person County did not lose jurisdiction of the person of the child but it continues, certainly to the extent of the supervision of the welfare of the child, until she becomes twenty-one years of age. We understand that the Mecklenburg County institution is not one supported and controlled by the State and so the superintendent of that institution has no right to disobey the proper orders of the juvenile court of Person County, that being the court which obtained jurisdiction of the person of the particular child, and that jurisdiction continuing until she becomes twenty-one years of age.

If, therefore, the judge of the Person County juvenile court, upon investigation, determines that the girl be returned to Vance County under the supervision of the superintendent of public welfare, and makes an order to that effect, the service of that order upon the superintendent of the Mecklenburg County institution will require him to turn over the child to the agent of the juvenile court of Person County sent for her. If the superintendent should fail to obey such order, he could be attached for contempt under C. S., sec. 5046. You will find the procedure upon such attachment indicated in a letter to Mrs. Clarence Johnson at page 188 of the biennial report of this office for 1921-22.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY SUPERINTENDENT—ELECTION

August 8, 1923.

MRS. KATE BURR JOHNSON, *State Commissioner of Welfare, Raleigh, N. C.*

DEAR MADAM:—It seems that in one of the counties of the State the county boards in joint meeting at the proper time, the second Monday in July, 1923, elected a county superintendent of public welfare. The person then elected was refused a certificate of fitness from your board, and you notified the two boards of the county to that effect. You inquire upon this whether the two boards have authority to postpone the election of a county superintendent of public welfare in that county until the first Monday in December; thus leaving the present incumbent of the office to hold over until that time. We think not. The statute upon this is mandatory. "No one so elected shall begin the work in this position until he shall have received a certificate of his fitness from the State Board of Charities and Public Welfare; and in case such approval is not received, the two boards shall, upon receiving notice thereof, proceed *immediately* in like manner to elect another person." We construe this as requiring the two boards to meet in joint session immediately upon receiving notice of the disapproval of the State Board of the person previously elected.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE STATE HOSPITAL

STATE HOSPITAL—INTOXICATING LIQUORS

December 30, 1922.

DR. ALBERT ANDERSON, *State Hospital, Raleigh, N. C.*

DEAR SIR:—Referring to our conversation over the 'phone.

As we understand the facts, they are as follows: You have a permit from the Federal prohibition agent in North Carolina properly executed under and in accordance with the provisions of the Volstead Act, to purchase, receive and use spirituous liquors in your hospital for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs. As we understand it also, this permit permits you to use it in the treatment of other patients in the hospital.

Section 3392 of the Consolidated Statutes permits the receipt of such liquor and its use only in the treatment of addicts to the use of liquor, etc. You wish to know whether the use of this liquor in the treatment of another patient having pneumonia would offend against the State law. We think not. You are permitted under the State statute to receive it, and we can conceive of no substantial reason why, if in your judgment as a physician it is necessary to use it on a pneumonia patient, this is not permitted by the State law.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE HOSPITAL—CRIMINAL INSANE

February 28, 1924.

DR. ALBERT ANDERSON, *Suprintendent, State Hospital, Raleigh, N. C.*

DEAR DOCTOR:—Your letter of the 25th instant is received.

The Supreme Court in the case of *State v. Craig*, 176 N. C., 740, referring to what is now sections 6236 and 6237 of the Consolidated Statutes, says:

The statute, therefore, or this portion of it, conferring as it does upon the trial judge the unusual power of detaining a citizen who has been acquitted by the jury, may become highly penal in its character; and, having specifically designated for its operation the crimes of murder, assault with intent to murder, rape, and assault with intent to commit rape, highway robbery, train wrecking, arson, all crimes of higher grade and in themselves importing serious menace to others, in adding thereto the general terms, "or other crimes," by correct interpretation means and was intended to mean other crimes of like kind and grade and does not extend to or include crimes like the present, misdemeanors which are not necessarily and inherently vicious or threatening and may be and not infrequently are committed

with very little demonstration of force. . . . Undoubtedly, if in the course of this or any other criminal investigation it should be disclosed by the testimony that the defendant's mind had become so far deranged and the insanity had taken such form as to threaten the safety of his family or his friends or neighbors, the magistrate, as a peace officer or under other provisions of the law, could order his present restraint, that proper steps might be taken with a view to his lawful commitment and care" . . .

I think the above quotation should give you a pretty clear idea of what was intended by the sections referred to in your letter of above date, and what class of criminal insane should be committed to your institution.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO ADJUTANT GENERAL

CITIES AND TOWNS—APPROPRIATION TO NATIONAL GUARD

August 23, 1924.

GENERAL J. VAN B. METTS, *Raleigh, N. C.*

DEAR SIR:—You inquire whether or not in the opinion of this office a town within which a unit of the National Guard is located has authority to make an appropriation for the support of that unit. From the general corporate powers conferred upon all cities and towns is sub-section 4 of section 2787 of the Consolidated Statutes:

To appropriate the money of the city for all lawful purposes.

The militia of the State is recognized in the Constitution, and has been recognized for many years, as the ultimate police of the State and its various governmental agencies. In this point of view we think such town may make a reasonable appropriation from its current funds for the support of the unit of the National Guard located within its bounds.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO STATE CHILD WELFARE COMMISSION

CITIES AND TOWNS—ORDINANCE—STATE LAW

December 19, 1922.

MR. E. F. CARTER, *Secretary, Child Labor Commission, Raleigh, N. C.*

DEAR SIR:—We have examined the ordinance adopted by the board of commissioners of the City of Wilmington regulating the employment of children in the trade of bootblack or selling newspapers, etc., upon the streets or in any public place of that city, and have come to the conclusion that in a number of particulars it is in conflict with the general State law. The authority of any municipality to enact ordinances is always in subordination to a public law regulating the same matter for the entire State, unless a clear intent to the contrary is manifest. The statute, C. S., 5031, et seq., seems to have taken over to the State the whole authority to regulate child labor. Section 5032 expressly prohibits the employment of any child under fourteen years of age in certain designated employments which include that of bootblack and newsboy. The same section, in order to avoid the rigidity of the statute in this particular, permits the State Child Welfare Commission to prescribe rules and regulations under which children under fourteen years of age should be employed. Section 5033 expressly prohibits the employment of any person under sixteen years of age in the industries mentioned in the above quoted statute after 9 p.m. and before 6 a.m. The rules provided in the ordinance permit the employment of these children as early as 5 a.m.

A copy of the regulations prescribed by the State Child Welfare Commission before us seems to deal with all the features of such employment with which the ordinance attempts to deal, and in such way as to conflict in quite a number of particulars with this ordinance. The statute says that a child under fourteen years of age may do labor under the rules and regulations prescribed by the State Child Welfare Commission. The ordinance says that he cannot labor in these employments except under a permit from the Commissioner of Public Safety of the city. The rules of the State Child Welfare Commission prohibit the employment of children under twelve years of age. The ordinance of the city prohibits the employment of children under ten years of age. Again, the ordinance makes its violation by a child between the age of ten and eighteen years a misdemeanor, with a fine of not less than \$1.00 nor more than \$5.00 to be imposed upon him for its violation, whereas, the juvenile court act, C. S., secs. 5039 et seq., prohibits the imposition of any punishment upon a child under fourteen years of age for an offense committed by him. Instead, he is dealt with as requiring the paternal oversight of the State, rather than its punitory justice.

For these reasons we think the ordinance of the City of Wilmington is void as an attempt to regulate that which the State has taken over for its own regulation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

OPINIONS TO THE SUPERINTENDENT OF THE STATE'S PRISON

CONTRACTOR—LIABILITY TO STATE CONVICT

October 2, 1922.

MR. GEO. ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

DEAR SIR:—You ask a written ruling of this office upon the liability of contractors to prisoners contracted to them by the State's Prison. So far as the negligent or willful acts of the contractor, his servants or agents, are concerned, he is liable for them, occasioning damage, just as he would be to any other employee. The legal relation of the convict in this regard to the contractor is modified to some extent, as we understand it, by the fact that the discipline and guarding of such convict is still in the hands of the State's Prison officials or sub-agents. Of course, these officials or agents of the State's Prison are not the employees of the contractor in such way as to make him liable for the defaults or neglects of such employees or agents.

Very truly yours,

JAMES S. MANNING,

Attorney-General.

STATE PRISON—INDOOR LABOR

January 30, 1923.

MR. GEO. ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

DEAR SIR:—In reply to yours of January 27th.

A chair company proposes to furnish the State's Prison with two hundred chair seats or backs per day to be caned. It is to furnish all material used in the same and to pay freight both ways to and from Raleigh. The State's prison is to have a man look after the work and see that it is well done. The chair company is to furnish two men for a period of one week to teach the prisoners the work. All of this work is to be done in the State's Prison and under the superintendence of its officials.

We agree with you that this may be done under Section 7762 of the Consolidated Statutes. That section revises Section 2 of Chapter 286, Public Laws of 1917, and Chapter 80, Section 1, Public Laws of 1919. The authority to do this work is conferred by that portion of the section which qualifies the prohibition against contracting, letting or farming out the labor or time of any prisoner or convict, and is in these words:

Unless such convict shall be fed and clothed by the Prison and shall be quartered, guarded and worked under the sole provision and control of the Prison directors.

It is manifest here, we think, that this qualifying provision is complied with in the contract which you propose to make with the chair company.

Very truly yours,

JAMES S. MANNING,

Attorney-General.

STATE CONVICT—MONEY ALLOWANCE

September 19, 1923.

MR. GEO. ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

DEAR SIR:—In reply to yours of September 18th.

The money in the hands of the State's Prison, earned by a prisoner confined there, under C. S., sec. 7725 is not a fund that can be garnisheed or attached by anyone for any purpose. There are at least three insuperable reasons why this cannot be done: first, the funds are in the hands of the State's Prison, which is a Department of the State Government, and is not liable to be hailed into court upon garnishee process; second, the money does not belong to the prisoner in a personal sense until he is discharged from the Prison; third, even if it belonged to him in a personal sense, it is money coming to him from the State of North Carolina and cannot be attached or garnisheed, as in one sense of the word he is an employee of the State.

We return the papers herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE CONVICT—CONDITIONAL PARDON

October 22, 1923.

MR. GEORGE ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

DEAR SIR:—In yours of October 20th you put this question to us: When a conditional pardon is granted to a convict, is that conditional pardon revocable at any time for breach of condition, or is the convict automatically to be discharged and free at the expiration of his original sentence, had he remained in the State's Prison?

The essential part of a sentence for the violation of a criminal law is the punishment for the offense committed, and not the time the sentence shall begin and end; where, therefore, the prisoner has accepted a conditional pardon from the Governor and has obtained his freedom, the breaking of the condition after the original term would have expired affords no legal excuse why he should not be recommitted to serve out the balance of his sentence. *State v. Yates*, 183 N. C., 754.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE CONVICT—PUBLIC HIGHWAYS

February 11, 1924.

MR. GEO. ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

MY DEAR SIR:—Your letter of February 8th is received.

In this letter you ask me what power the board of directors has in the use of convicts upon the public highways of the State and in doing work

incident to the construction of said highways, and what convicts can be worked upon such highways.

Section 1 of Article 11 of the Constitution of the State after prescribing punishment for violations of the laws of the State proceeds:

The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways or other labor for public benefit, and the farming out thereof where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson; provided that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer except by a responsible officer of the State, but the convicts so farmed out shall be at all times under the supervision and control as to their government and discipline of the penitentiary board or some officer of the State.

The prohibition in the Constitution is that no convict "shall be farmed out" who has been sentenced on a charge of murder, etc. The sentence to imprisonment with hard labor is construed in the Constitution to authorize the employment of such convict labor on public works or highways or other labor for public benefit. In the legislation giving effect to the provision of the Constitution, which is Article 5, Chapter 130, beginning with section 7758 of the Consolidated Statutes, there seems to be no limitation as to the convicts to be farmed out or hired. The working them on the public roads and public highways as a part of the punishment is expressly approved by the Supreme Court in *State v. Young*, 138 N. C., 574, as it is expressly authorized by the Constitution. The question is, what is meant by farming out of the convicts? It would seem under the provisions of section 7762 that the farming out does not apply where such convict is fed and clothed by the Prison and is quartered, guarded and worked under the sole supervision and control of the Prison directors.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

STATE CONVICT—SPECIAL ACT

February 14, 1924.

MR. GEORGE ROSS POU, *Superintendent, State's Prison, Raleigh, N. C.*

MY DEAR SIR:—Following our conversation this morning, Mr. Hendricks has come to the office and has referred me to Chapter 271, Public-Local Laws of 1923, ratified the 28th day of February, 1923, entitled "An act authorizing and requiring the commissioners of Madison County to open up and build a road from the mouth of Ivey up the French Broad River to the Buncombe County line to the east side of the river." I have carefully read section 7 of this act, which is the section that concerns the State's Prison.

Omitting reference to certain recitals in the act which are intended to justify the Legislature in enacting it, the section declares:

Now, therefore, the State authorities in charge of the State convicts be and they are hereby instructed to send the first convicts available under the supervision of the State to Madison County to build said link of road according to the survey heretofore made by the State or according to such arrangements thereto as the State Highway Commission may deem expedient and proper. The State Treasurer is hereby authorized and directed out of any money not otherwise appropriated to pay to the State's Prison the regular per diem for each convict furnished by the said State's Prison on this project, the cost of the transportation of the convicts so furnished to and from the project, together with the necessary camp equipment and the cost of the necessary employees sent with the said convicts; this to include also the cost of the transportation of said employees to and from the project. The Auditor of the State shall issue his warrant to the State Treasurer monthly during the progress of the work upon the presentation by the Superintendent of the State's Prison of an itemized statement of the costs as above defined, which accrued the preceding month, and the Treasurer shall pay said warrant.

It is clear to me that this section directs the Penitentiary authorities to furnish the convicts for the purpose of building this link in this road and I understand that the convicts are now at work on the project. The act clearly defines what cost the State is to pay, to wit: the per diem cost of the convicts, the cost of transportation to and from the project, the necessary camp equipment, the cost of the necessary employees sent with said convicts and their transportation to and from the project. It is not provided in the act that any other cost or expense of the work is to be paid by the State. The State is to furnish the man-power to build the road and to pay the cost, including transportation and the necessary guards and employees with the convicts. I find no authority in the act for the State to exceed this cost.

I am furnishing a copy of this letter to Mr. Hendricks, attorney for the board of commissioners of Madison County.

Mr. Hendricks has submitted to me also a contract prepared between the State's Prison and the commissioners of Madison County. I do not think that this contract is in accordance with section 7 of the above act. The State's Prison is not furnishing these convicts under any contract with Madison County but under the direction and authority of an act of the Legislature.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CRIMINAL INSANE—TRANSFER

September 2, 1924.

MR. GEO. ROSS FOU, *Superintendent, State's Prison, Raleigh, N. C.*

DEAR SIR:—Your letter of August 29th is received.

I have examined Chapter 165 of the Public Laws of 1923, entitled "An act

to abolish the State Hospital for the Dangerous Insane and to provide for the commission and care and cure of such insane at other State Hospitals." Section 12 of that act provides that:

The patients now confined in the State hospital for the dangerous insane shall not, however, be transferred as herein provided from such hospital to the other hospitals *under* the superintendent of the State Hospital for the Insane at Raleigh and the superintendent of the State Hospital for the Insane at Goldsboro notifies the Superintendent of the State's Prison that they are ready to receive such patients.

I think it is apparent that the word "under" must have been intended for "until," as it is not grammatically correct as it stands.

You do not state in your letter that you have been notified by the Superintendent of the Hospital for the Insane at Raleigh and at Goldsboro that they are ready to receive the dangerous insane from the State's Prison. If you have received such notice, then you can transfer them by sending these dangerous insane under guard to the respective institutions with a certified copy from your office of the commitment and a certified copy of the report of the Prison physician that such patients are still insane. This refers to whether the dangerous insane are men or women. I think it is up to the hospital, if it has notified you, to receive such persons and care for them in the insane institutions until they have been restored to reason. If their reason is restored before their terms of imprisonment are concluded, then they must be returned to the State's Prison, to serve the sentence imposed by the Court.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MISCELLANEOUS OPINIONS

MARRIAGE LICENSE—DEATH OF CLERGYMAN

August 4, 1922.

DEAR SIR:—In reply to yours of July 31st.

You state that a minister married a couple under a regularly issued license, but died before he could make the return to you as required by law, C. S., 2502. We suppose the minister also failed, before dying, to fill up and sign the certificate attached to the license, but the proper number of witnesses did sign.

Under such circumstances, we suggest that the license may be returned to you by the administrator, or any member of the minister's family, who had possession of his papers before the appointment of the administrator, though neither could fill up the blanks or sign the certificate; that you prepare for the witnesses present an affidavit, setting out all the facts required in the minister's certificate in section 2502, and that he had died since the marriage, and before making the certificate; get these witnesses to sign and swear to the affidavit, attach the affidavit to the license, and file it with it, then make up your record as required by section 2504, as though the minister's return was made regularly before his death. Or if he filled up the certificate but failed to sign, or return it, and then died, proof of his handwriting and his death by the witnesses would be sufficient.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—GIFT ENTERPRISE—TRADING STAMPS

August 28, 1922.

MR. FRANK T. WOLCOTT, *Counselor at Law, 114 Fifth Avenue, New York City.*

DEAR SIR:—We have received your letter of August 24th and have considered it carefully. You misapprehend, it seems, the ruling of this office upon the question of the liability of the Southport merchant for the license tax imposed by Section 51 of the Revenue Act. We have not at any time held that either your company or the merchant at Southport in using your trading stamps, was conducting a gift enterprise within the meaning of that section. We are well aware of the fact that a gift enterprise has been interpreted as involving an element of chance. Such enterprises in North Carolina will be almost necessarily a lottery and so prohibited by our criminal statutes. If you will notice section 51, you will observe that it is so drawn as to tax any person conducting a gift enterprise or (notice the alternative) any person offering any article for sale and proposing to present purchasers with any gift or prize as an inducement to purchase. These latter words would have no meaning at all unless they were construed with their obvious and ordinary signification.

We have ruled that a merchant who uses trading stamps as an inducement to purchase when those stamps are redeemable in articles of personal property, comes within this alternative provision of the statute. In *Winston v. Beeson*, 135 N. C., 271, the ordinance was as follows:

Each distiller of fruit or grains, each distiller or compounder of spirituous liquor, each gift enterprise or lottery, each railroad company having a depot or office in town, a license tax not exceeding \$50 a year.

The Court there was construing this ordinance and in doing so, tested the signification of the words "gift enterprise" by the words associated with them, and so held that the ordinance would not apply to the business of your concern, who are dealers in trading stamps. In this we entirely agree with the Court. The circumstances as detailed in your former letter, which surround the case of the Southport merchant, clearly show that the trading stamps were not a cash discount such as are the National Cash Register coupons given at the time of the purchase as an actual discount for the cash. This also seems to have been the case, construing the situation in Montana, when your concern made arrangements for redeeming in cash certain coupons given by merchants as a premium for cash purchases. If we are wrong in this view, we would suggest that the Southport merchant pay the license tax under protest and sue to recover it back.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BOARD OF ANATOMY—AUTHORITY

September 20, 1922.

Chairman of the State Board of Anatomy, Chapel Hill, N. C.

DEAR SIR:—You ask this office to construe Article 13, Chapter 110, of the Consolidated Statutes, secs. 6785, et seq., with reference to the authority of the Board of Anatomy by its rules and regulations, or otherwise, to designate the embalmer who is to receive the cadavers allowed to be distributed in said article among the medical schools of the State. We think it quite clear that this Board has the proper authority to make this selection.

Section 6785 constitutes the professors of anatomy of the several medical schools of the State a board for the distribution of dead human bodies for the purpose of promoting the study of anatomy in the State, and expressly authorizes this board to make proper rules for its government, and the discharge of its functions under this article.

Section 6786 describes the class of bodies which are to be turned over to the board, and also designates the officers of the State or any county or town who shall turn over these bodies to the board. They are to be turned over to the board upon the demand of the board or its authorized agent. The body is to be delivered to anyone designated by the board for the purpose aforesaid. The purpose aforesaid, in our opinion, refers to section 6785 for its definition, i. e., the distribution of dead bodies for the purpose of promoting the study of anatomy in this State.

Section 6788 expressly declares that the bodies obtained under this article shall be embalmed before being used for the purpose of dissection. As this is a necessary requirement, the board may require the delivery of the dead body to the embalmer selected by it for embalming the body for dissection. It can provide the machinery for this under its authority to make proper rules for the discharge of its functions. Of course, those rules would be restricted by the terms of the statute in the particulars stated in section 6787, entitled "How bodies are to be distributed."

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MANUFACTURING ESTABLISHMENTS—CAFETERIAS

September 22, 1922.

HON. M. L. SHIPMAN, *Commissioner of Labor, Raleigh, N. C.*

DEAR SIR:—In reply to yours of September 21st.

Section 6554 of the Consolidated Statutes declares that sixty hours shall constitute a week's work in all factories and manufacturing establishments. You inquire whether or not a cafeteria is a manufacturing establishment within the meaning of this section. We think it very clear that it is not. A cafeteria is no more a manufacturing establishment than a restaurant or cafe. All of these enterprises have for their primary purpose the catering to the appetites of the public; that before the average man can eat with zest most articles of food, they must undergo a process of manipulation and be subjected to a certain amount of heat before they are edible, does not make any one of these businesses a manufacturing establishment. While we are not inclined to restrict the meaning of the terms, "factories and manufacturing establishments," we think that it would be extending them beyond any ordinary signification to make them apply to the immediate conversion of raw products into edible food. The Legislature evidently intended the words to be taken in their ordinary signification, which of course, would include all places where articles are produced for use from raw or unprepared materials by giving these materials new forms, qualities, properties, or combinations, whether by manual labor or machinery. While in its broadest interpretation this definition would include a cafeteria, yet the change of the material from the raw to the cooked state is not the main object in such business. That is purely incidental to the serving of food in its cooked state to the public. Cafeterias, restaurants and cafes, then, are clearly distinguishable from bakeries, which are manufacturing establishments within the meaning of the statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FOREST WARDENS—FEDERAL AND STATE

October 13, 1922.

COL. JOSEPH HYDE PRATT, *Director, Chapel Hill, N. C.*

DEAR SIR:—In yours of October 11th you state that "in order to allow the enforcement of the State laws on national forests with equal effectiveness

as to other lands, we should like to appoint the federal forest officials State wardens, in order to give them this necessary authority," and you inquire whether or not there is any valid objection to your doing so.

Section 6134 of the Consolidated Statutes allows the forester of the State Geological and Economic Survey to appoint with the approval of the Geological Board, one township forest warden and one or more district forest wardens in each township of the State in which the amount of forest land and risks from forest fires shall in his judgment make it advisable and necessary. We think this section thus conferring the power to appoint, specifically includes in it the authority also to impose the duty of forest warden *ex officio* upon a similar United States official having charge of the Federal forests in North Carolina. By doing this the difficulty of holding two offices at one time may be met. You, of course, understand that both the Federal and State statutes are operative within these forest reservations. The act which permits the Federal Government to establish a national forest reservation in North Carolina, C. S., 8057, is given under condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Section 5131 (sub-section 10), Comp. Stat. 1918, provides:

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that state wherein any such reservation is situated, shall not by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

Section 5153 allows all persons employed in the forest reserve service of the United States to make arrests for violation of the laws and regulations relating to such forest reserve. It further provides that they shall be taken immediately before the United States Commissioner. This, of course refers to violations of the laws and regulations of the United States Government.

The effect of these statutes is to give the State concurrent jurisdiction with the Federal Government in enforcing the State criminal laws within the bounds of such reservations. Where, then, the State law enacted to prevent forest fires does not conflict with Federal rules and regulations, but is in accord with them, the person who does an act which offends against the State law and the Federal law may be prosecuted under either jurisdiction, as the act is an offense against the two sovereignties. Of course, it must be understood that if the State law in any manner conflicts with the Federal law in a reservation, the Federal law would be supreme. The Federal statute evidently contemplates coöperation with the state governments in the prevention of forest fires. It is for this reason that we think your scheme of selecting Federal forest rangers as persons to enforce the State

law against forest fires within such forest reservations may be put in effect as above suggested without offending against either the State Constitution or the Federal laws.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ELECTIONS—INDEPENDENT CANDIDATE

October 20, 1922.

MR. J. D. NORWOOD, *Chairman, Democratic Executive Committee, Raleigh, N. C.*

DEAR SIR:—You inquire whether or not in the opinion of this office, a duly qualified voter in a particular county may run as an independent candidate in that county for an office without having complied with the provisions of C. S., 6051. We think it one of the privileges incident to the fact that one is a duly qualified voter in North Carolina, to run for any office he may please in a general election, this notwithstanding section 6051. That section does not specifically prohibit independent candidates. It only provides a method by which a nonpartisan candidate may have his name placed upon an official ticket, which official ticket is to be printed by the county board of elections, if he is a nonpartisan candidate for a county office, or by the State board of elections, if he is a nonpartisan candidate for a district or State office. There may then be, legally, independent candidates for particular offices not nominated by any primary or in accordance with the rules of any political party, but they have the whole expense of printing and distributing their ballots. If such ballots are cast for them at the general election, they, of course, should be counted.

It is exceedingly doubtful whether the Legislature has constitutional authority to prohibit in express terms independent candidates in general elections. If it has that authority, it has not exercised it in the statutes as they are now.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REGISTRATION BOOKS—COPIES

October 26, 1922.

DEAR SIR:—In reply to yours of October 24th.

There was no conflict in the telegrams referred to by you in your letter. They were replies to questions which required a different point of view in the answer. Indeed, such questions ought not to be propounded to this office by telegram, for it is impossible to answer them within the limits of reasonable length so as to state all the qualifications to a general statement.

The telegram of October 28, 1920, was sent as the registration books were being closed. The second telegram was sent while the registration period was still running. Books in the custody of the registrar are public records and if anybody desires a copy thereof at a time and place which do not interfere with the registrar in the performance of his duties and which do not take the books out of the immediate presence of the registrar so that

he can prevent any tampering with them, for he is their custodian and responsible for them, he may copy the names from the registration book. Where, however, the registrar is engaged in registering voters, he has control of the registration books for that purpose, and if "Tom, Dick and Harry" were allowed to go even in his presence and copy the books, they would interfere with him in the performance of his duties. Therefore, if they desire a copy at that period, it is a question for him to determine and if they are willing to pay him for a certified copy and he chooses to make the copy, why, he may do so. There is no statutory right to demand a copy of the registration books at any time. We think, however, that they being public records, as said above, a citizen interested may obtain a copy of them in a proper way, with the consent of the registrar under conditions stated above.

We do not interpret section 6016 of the Consolidated Statutes (election law) as applying to registration books but only to those poll books which are required by the statute to be kept by judges of election at the time of the election. That section, too, evidently contemplates that the application for a copy of the poll books shall be made only at the conclusion of the election, because it would not be possible to give a copy during the pendency of the election without interfering with the duties of the holders of the books.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—LIBRARIES

October 28, 1922.

MISS MARY B. PALMER, *Library Commission, Raleigh, N. C.*

DEAR MISS PALMER:—Mr. Andrew J. Howell in his letter to you of October 27th states that the citizens of Whiteville, N. C., sustain their public library by private donations. They are trying to induce the governing authorities of the town of Whiteville to appropriate money derived from the general taxes of the town in part support of the library, and you request an opinion from this office as to the authority of the governing body of the town to appropriate money for this purpose.

The general powers of municipalities are stated quite extensively in C. S., secs. 2787 to 2789. Among other such powers is that contained in subsection 7 of section 2787:

To pass such ordinances as are expedient for maintaining and promoting the peace, good government and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

We think that this is legislative authority to appropriate sums of money accruing from the general taxes of the town to the support of a public library under the limitations hereinafter stated. The Supreme Court in *Wood v. Oxford*, 97 N. C., 228, declares that the Legislature may authorize municipal corporations to apply their revenue to any legitimate public purpose within the scope of its organization, unless prohibited by the Constitution; and such purposes as tend to the general good of the community,

although the advantage does not reach every individual tax payer residing there, is such public purpose. If, therefore, the town has in its treasury money which can be appropriated to this purpose, the governing board of the town may appropriate it, with such rules and regulations attached to the appropriation as they deem fit to the support of a public library. The board, however—a public library not being a necessary expense—cannot incur a debt for its support nor levy a special tax for its support except upon approval of a majority of the qualified voters in the town. This principle is recognized by the Legislature in C. S., secs. 2694, et seq. Their authority, then, extends no further than to make an appropriation from funds in hand at the time of the appropriation, and the present board cannot bind its successors to make this appropriation annually, but it is a matter for their determination when presented to them from time to time, and is dependent upon the amount of money in hand.

We think this the proper construction of the duty and authority of towns under such circumstances as defined in general terms by the Legislature and in the light of section 7 of Article VII of the State Constitution.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ABSENT VOTERS—AUSTRALIAN BALLOT

November 1, 1922.

MR. J. D. NORWOOD, *Raleigh, N. C.*

DEAR SIR:—We have considered carefully letter of Mr. N. B. McDevitt to you in regard to voting of the absentee voters by certificates. As you no doubt know, the original absentee voters' act was Chapter 23 of the Public Laws of 1917. That act expressly restricted the right to those absent from the county on the day of election. In 1919 the General Assembly in Chapter 322 Public Laws, amended the act of 1917 in two general particulars: first, it extended the right to those physically unable to attend on the day of election for the purpose of voting in person, which fact must be made to appear by the certificate of a physician or by affidavit; second, it permitted the absent voter at his discretion to cast his ballot by the certificate provided in the act. The form of the certificate is to be found in section 5962 of the election law. Where, then, a person although in the county, is unable to attend a polling place for the purpose of voting, and this fact is established by the certificate of a reputable physician or by affidavit, then this person may send his ballot in the form of the certificate mentioned above, sealed up and witnessed, to the judges of election and it is to be opened at three p.m. of election day, as are other ballots of absentee voters. If this person, though not absent from the county, chooses to use the other certificate provided in the above named section and accompany it by proper ballots, then those ballots are likewise to be opened and counted at three p.m. The original act required the ballots or certificates to be mailed to the absentee voters. The amendment of 1919 permitted them to be sent otherwise to the proposed voter. In both methods of voting, however, i.e., either by certificate or ballot, the votes are to be returned to the registrar and judges of election sealed up in an envelope furnished for that purpose. If such vote should be

sent by carrier without having been sealed in an envelope in this way, it would not be a valid vote.

We suppose that Mr. McDevitt in speaking of "markers" means persons who are to mark for the proposed voter the Australian ballots required in Mitchell County. The act, chapter 606 of the Public-Local Laws of 1917, requires these ballots to be marked by the voter himself within the enclosed space required to be set up about the polling place. He cannot come to the polling place under the law with a ballot already marked, but he must, as just said, mark his ballot within the place fixed about the polls. There is one exception made by section 32 of the act: any voter who is obviously unable to enter the booth without assistance or to mark his ballot, or who shall make oath that he cannot through physical disability or through illiteracy, do so, may choose one of the judges of election who shall thereupon select some other person of good moral character of a different political faith from that of such judge, and the two shall conduct the voter to the booth, and if necessary, enter with him and assist him in preparing his ballot. Then it goes on and prevents solicitation of the voter even by these two persons. So, Mr. McDevitt has in the act itself all the machinery necessary to prohibit the marking of ballots by any other person than the voter himself, in the booth itself or by the other two persons specified in the act. Whether or not this Australian ballot enacted in 1917, which declares expressly that no other ballot than that described in the act shall be cast at an election with an exception not material to the discussion, would prevent the use of these certificates as ballots, is a question which admits of serious discussion and we do not undertake to determine that question, as it is one that only the Courts can deal with. In Jackson County this Australian ballot was adopted in 1921 after, of course, the amendment of 1919, so it is quite probable that the manner of voting by certificate is not applicable to that county.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BOARD OF MEDICAL EXAMINERS—LIMITED LICENSE

December 12, 1922.

DEAR SIR:—In reply to your request for an opinion from this office as to the power of the State Board of Medical Examiners to issue either a limited license to practice medicine or to issue a license without examination, to Dr. Mahoney, I understand the facts to be as follows:

The Ellen Fitzgerald Hospital at Monroe, N. C., through its trustees, has made arrangements with Dr. Mahoney to act as its surgeon and assume the management and control of the hospital. Dr. Mahoney is a resident and licensed physician in the State of South Carolina and has completed the requirements as to college education and procurement of diploma necessary to entitle him to examination under the laws of the State of North Carolina. I understand that he has applied for license to practice medicine less than thirty days prior to the date of this letter, and is advised that under a regulation of the State Board of Medical Examiners, applicants must make application for license or examination more than thirty days before the

license is issued or examination held. Before this discovery was made, arrangements had been made by the Hospital and by Dr. Mahoney for him to take charge January 1st, and unless he is licensed by the State Board of Medical Examiners, he cannot take charge, and the work of the Hospital must be suspended.

Upon this statement of facts you ask the opinion of this office upon the question, whether or not, considering emergency, the Board of Medical Examiners has authority to waive this requirement. It appears to us that they have this authority in two aspects.

(1) Under section 6616 (C. S.), which appears not to have been modified in any way by subsequent legislation, the Board may in its discretion issue a limited license, certainly until Dr. Mahoney can comply with the thirty day rule of the Board.

(2) It seems that for the first time, at the extra session of 1921 (Chap. 44, Public Laws) the Board of Medical Examiners was empowered to prescribe such regulations as it may deem proper governing applicants for license, admission to examination, the conduct of applicants during examination, and the conduct of examinations proper. We suppose that acting under this authority the Board promulgated the thirty day rule.

If the Board at its discretion should determine that the peculiar facts of this case and the exigency arising from the necessity of having a physician at the head of the Ellen Fitzgerald Hospital should create an extraordinary condition, it might modify this thirty day rule so that license could be issued to Dr. Mahoney now.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INTOXICATING LIQUORS—JAMAICA GINGER

January 12, 1923.

DEAR SIR:—In reply to yours of January 8th.

You ask whether or not a drummer taking orders from store to store for Jamaica Ginger or from soft drink stands would be liable to prosecution under the North Carolina statutes. We cannot answer this question categorically "Yes" or "No," as it involves considerable doubt. C. S., sec. 3368 defines intoxicating liquors as "all liquors or mixtures thereof by whatever named called that will produce intoxication." This section, however, recognizes the fact that medical preparations might come within this definition, so it creates an exception. But in order to come within this exception, they must contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in the preparation and no more alcohol than is necessary to hold such agents in solution. Even these, however, must be manufactured and sold as medicines and not as beverages. If they are so manufactured and sold, then they are intoxicating liquors within the definition of that statute. Keeping this definition of intoxicating liquors in mind, we come to section 3370, which makes it unlawful for any person for himself or as agent or traveling salesman for any person, firm or corporation, to solicit orders or proposals for the purpose of selling intoxicating liquors by the jug or bottle or otherwise within the State of North Carolina. If,

then, Jamaica Ginger is sold not as a medicine but as a beverage, it is not protected by section 3368, and the agent or drummer selling it, knowing that it is to be used as a beverage, would be guilty under section 3370.

Section 4507 expressly prohibits the sale of Jamaica Ginger in North Carolina except in filling prescriptions of physicians by a duly qualified druggist. Since the Webb-Kenyon act, then, (Compiled Statutes, U. S., sec. 8739) it seems that a drummer selling Jamaica Ginger indiscriminately to soft drink stands would be guilty of the offense defined in section 3370 and would be punishable under the laws of North Carolina, notwithstanding the fact that he was taking orders for the Jamaica Ginger which were to be filled from without the State and was selling it in interstate commerce.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—EXEMPTION—CITY BONDS

January 18, 1923.

DEAR SIR:—You inquire of this office whether or not the bonds of cities and towns are, as the law is now written, exempt from taxation.

Omitting for the present any special act of the Legislature which attempts to permit a particular city or town to issue bonds which could be exempt from taxation, we are entirely clear that these bonds are not exempt from taxation. It is true that the Constitution (Sec. 5 of Art. 5) exempts all property of municipal corporations from taxation, but the bonds of such corporation are in no sense its property. On the contrary, from their nature are liabilities. Whether or not the Legislature has constitutional authority to permit a town to exempt its bonds from all taxation is not so clear, though in *Commissioners v. Webb*, 160 N. C., p. 594, the Chief Justice writing the opinion, says:

- We do not know of any county or municipal bonds being exempted, but if it can be done, the exemption would only extend to taxes of the county or municipality issuing such bonds; else to the extent of the exemption such county or municipality would be taxing the people of the rest of the State.

This seems a direct decision that the Legislature has not constitutional power to exempt the bonds of a city or town from general taxation. It may, however, permit the city or town to exempt its own bonds from the taxation of the city or town issuing such bonds, but no further.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FOREIGN CORPORATIONS—INCREASE CAPITAL STOCK

January 25, 1923.

GENTLEMEN:—Your letter of January 19th to the Secretary of State has been by him referred to this office for reply.

The North Carolina statute which requires domestication of foreign commercial corporations doing business in the State is incorporated in the Consolidated Statutes of 1919 as section 1181. That the permission of the State may be obtained to do this business, such foreign corporation is required to file in the office of the Secretary of State a copy of its charter attested by its president and secretary under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this State, name of the agent in charge of such office, the character of the business which it transacts and the names and postoffice addresses of its officers and directors.

The fees required by the statute to be paid by the foreign corporation to the Secretary of State to obtain this permit are 20 cents for every \$1,000 of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than \$25 *nor more than \$250*, and also a filing fee of \$5. The latter, of course, is to pay the expenses of making the record of such application and permit in the office of the Secretary of State.

Upon compliance with these provisions of the domestication statute, the corporation can do in the State of North Carolina any business authorized by the charter granted it by the state of its residence, provided, of course, such business is not prohibited by the positive law of the State of North Carolina. As we understand the question, it arises out of a difference of construction put upon this statute by the office of the Secretary of State and yourselves with reference to an increase of the capital stock of a foreign corporation after it has obtained permission to do business in this State. The Secretary of State claims, as we understand his position, that if there is such increase of capital stock, it should be reported to his office in order that the fees for permission to do business in this State should be increased in proportion that the capital stock had been increased by an amendment to the charter, provided, however, that in the original permit the fee had not been the largest amount permitted, \$250. This contention is based upon an inference drawn from the expressed provision of the statute that the fee for permission to do business in the State is to be fixed by the total amount of capital stock authorized within the limits of \$25 at the base and \$250 at the top of these fees.

A case may be very easily imagined in which a foreign corporation might become domesticated with a total authorized capital stock so small as to make the fee for domestication not greater than \$25, and a short time after such domestication it might obtain from the state of its residence authority to increase its capital stock to such an amount as if that authorized capital stock had appeared at the time of its application to do business in North Carolina the fee would have been \$250. In the administration of the law, then, and for the protection of the State, the Secretary of State has required these increases of capital stock by foreign corporations to be reported to his office in order that fees for the privilege of doing business in the State might be made commensurate with the capacity of the corporation to do business as attested by the amount of its total authorized capital stock.

It must be kept in mind that this is not an annual franchise tax, but a fee levied for permission to do business in the State. We do not understand that the *International Paper Co. v. Mass.*, 246 U. S., 135, case has any appli-

cation to this condition. In that case the limit of \$2 500 in the amount of the excise tax measured by the total authorized capital stock had been removed, and this being true, the Supreme Court held that such excise tax was a burden upon commerce. With the limit in the act, this Court had theretofore held in *Baltic Mining Co. v. Mass.*, 231 U. S., 68, that the act was constitutional.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SURCHARGE—PULLMAN CARS

February 13, 1923.

DEAR SIR:—You have requested this office to examine and pass upon the constitutionality of a bill entitled "An act to prohibit the railroads in North Carolina from collecting surcharge on Pullman car transportation within the State.

We have considered this bill carefully and notice that it is strictly limited to intrastate traffic, excluding not only by inference but by express words all transportation of an interstate character. Thus carefully guarded, there could be no doubt that this bill would be constitutional previous to the enactment of the Federal Transportation Act of 1920. Since that act a doubt is created particularly under the Wisconsin and New York intrastate passenger fares cases as to whether or not this act would so interfere with the revenues of the railroads as to lessen the amount of such revenues allowed by the transportation act. This doubt is serious, but in the opinion of this office not so serious as to prevent the Legislature enacting the proposed bill into a law under its constitutional authority, leaving the determination of its constitutionality, after its enactment, to the railroads themselves.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTIES—REFUNDING SCHOOL INDEBTEDNESS

March 22, 1923.

DEAR SIR:—Article 23 of the recently enacted school code provides machinery through the use of which the county commissioners of the various counties in the State may fund outstanding school indebtedness. This outstanding school indebtedness must, however, be an indebtedness which was incurred by the board of county commissioners in an attempt to obey the mandate of the Constitution that the schools of the county should be maintained for six months. Assuming that the indebtedness is of this class, the statute provides two methods by which this outstanding indebtedness for necessary expenses may be funded.

The first is by issuing notes. If these notes are issued, they shall be in such form and shall carry such rate of interest not in excess of 6 per cent and payable at such time and place as to the commissioners shall seem best. These notes are to be serial notes, that is, notes whose payment is to run through a series of years. How long they should run is a matter in the dis-

cretion of the board of county commissioners; provided, however, that the notes are serial in form. The statute is unfortunate in not fixing the earliest period at which these serial notes shall be paid and not also fixing the latest period at which they can be made to run. In the absence of this express declaration on the part of the statute, we think that this is a matter for the determination of the board of county commissioners, of course, within reasonable limits,—certainly not exceeding thirty years. It is questionable whether the board of county commissioners can issue these serial notes to any other person than to an existing creditor of the county. It is, however, entirely permissible for the board to fund an indebtedness due by them to a particular person, firm or corporation by the execution of these serial notes payable to the order of such creditor. There can be no question that they are not to be put up and sold after advertisement. It is simply a transaction between the debtor county and the creditor of that county by which the debt is funded and its payment provided for in successive years and at a future period.

The second method for funding this outstanding indebtedness of the county is through the issue of bonds of the county. These bonds are to be sold in the same way as that provided by the municipal finance act for the sale of bonds of cities and towns. This method is adopted by the board of county commissioners whenever they desire to raise money from the proceeds of the sale of such bonds to pay outstanding indebtedness described in the statute. By this method they settle with existing creditors by the use of the proceeds of the sale of the bonds, and the persons who purchase the bonds are substituted as creditors of the county.

The first method, we think, was intended for the benefit of existing creditors; the second method was intended to raise money to pay off existing creditors. There can be no question, then, that an existing creditor is perfectly safe in accepting the notes of the county under this statute.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE ACCOUNTS—AUDITING

March 31, 1923.

PRICE, WATERHOUSE & Co., *Raleigh, N. C.*

ATTENTION OF MR. J. P. WALSH.

DEAR SIR:—We have received your letter of March 30th, and while it involves largely questions of method of accounting, rather than of law, we answer it suggestively as follows:

It is unfortunate, we think, that the Committee which employed you required your report to show the condition of the State finances at the end of the calendar year 1922 instead of at the end of the fiscal year, June 30, 1923. This requirement necessarily introduces confusion into the problem.

First. We think the unexpended balance of the appropriation specifically made to some particular institution remaining in the Treasury on December 31, 1922 is a liability of the Treasury at that time.

Second. The funds, general or special, to which should be applied

(a) The premiums realized on sale of bonds or notes. We regard these as an increment to the fund for which the bonds are sold. But see letter of April 14th, 1923.

(b) Expenses incident to the preparation and sale of such bonds and notes. As we understand it, they are a charge against the proceeds of such sale.

(c) Accrued interest paid by purchasers of bonds or notes from the effective dates of these instruments to the dates of sale. If the interest on these bonds is to be paid from the general fund of the State, this interest goes into the general fund.

C. S., sec. 7684 expressly declares that the interest collected on bank balances from time to time shall be paid into the State's general fund. The State Treasurer is authorized by a number of acts to borrow money on short term notes, awaiting the time when bonds should be sold and the proceeds thereof available. As we understand it, money borrowed in this way is to be paid from the proceeds of the sale of the bonds and is a temporary expedient in anticipation of such sale. If the statute requires the proceeds of the bonds to be used for a special fund, we do not see why there should be any difficulty in charging the notes to this special fund and crediting the special fund when the proceeds of the bond sale are applied to the liquidation of the outstanding notes. The Treasurer in section 7685 of the Consolidated Statutes is authorized to make short term notes for emergencies, but these are limited to such emergencies and are made to meet appropriations which cannot be made from funds in the Treasury, on account of a delay in the collection of the taxes.

Third. To what periods should the income and corporation franchise taxes assessed under Chapter 4, Public Laws of 1921, be applied? How much of these taxes you may consider as an asset after December 31, 1922.

(a) The income tax. The confusion here arises from the fact that you are not dealing with the statutory fiscal year of the State, but with an arbitrary period, the end of the calendar year 1922. We see no difficulty in stating the proceeds of the income tax for which persons liable report their income for the calendar year 1922, as an asset in plain view of the State Treasury at the end of the calendar year 1922.

(b) Corporation franchise tax. We see no reason why all of these taxes should not have been paid into the State Treasury before December 31, 1922. That was collectible before that time. Of course, there may be individual instances of the holding up of these franchise taxes, as in the case of the railroads, by litigation. There may be individual cases of a corporation starting business after December 31, 1922 and paying the full franchise tax which, as held by the State Treasurer, expires on May 31st of each year. In neither of these cases would, we think, that for the purpose of an account of Treasury conditions on December 31, 1922, it be proper to estimate these potential franchise taxes as part of the assets of the Treasury.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

AUCTIONEERS—JEWELRY—ACT OF 1923

April 13, 1923.

DEAR SIR:—Your letter of April 9th presents a difficult and interesting question. I had time this morning to go over to the office of the Secretary of State and read the bill. It is very drastic. It really appears that in order to defend it, we would have to sustain the power of the State to exclude nonresidents entirely from the business of auctioneering jewelry. However, as the act cannot be construed as discriminating against nonresidents except as it requires a residence in the State for two years before one is eligible to license, this point may be avoided. You will find *State v. Williams*, 158 N. C., 610, annotated in 40 L. R. A. (N. S.), p. 279.

Mr. Brown is evidently raising two points in this case:

(1) Discrimination against auctioneers of jewelry, and (2) Discrimination against nonresidents. It is quite clear, we think, that there is nothing in his first point. The statute makes a perfectly valid classification, considering the nature of the goods offered for sale at auction, the opportunities for fraud peculiar to the goods themselves, and other considerations not necessary to mention. The other point is more difficult. See, however, on that *Singer Sewing Machine Co. v. Bricknell*, 233 U. S., 304, 58 L. Ed. 974, and *LaTourette v. McMarster*, 248 U. S., 465, 63 L. Ed. 362. The latter case is, no doubt, the one that Mr. Brown hopes to distinguish from this case. If you will notice the concluding part of the decision, however, you will find that it is applicable directly to the statutes in question.

The Louisiana Supreme Court in *Lyon v. Stern*, 110 La. 473, sustains a statute which refuses license to any one not a citizen and voter in the State. On discrimination, you will find the case of *Stull v. DeMattos* in 51 L. R. A., 892 enlightening.

In *State v. Bates*, 101 Minn., 301, it is held that

An ordinance for the licensing of auctioneers, providing that such license shall not authorize the licensee to conduct any auction sale of jewelry or watches, is valid.

See also, *State v. Kazook*, 179 N. C., 708.

A hurried examination of the authorities resulted in this, but I will keep the matter in mind and investigate further, in order to be prepared to meet the case if it should come here. If it is possible, please have it tried in such way that the State can appeal if there is an adverse decision.

With high regards,

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

P. S. You will find *Wright v. May*, 149 N. W., 9 L. R. A., 1915-B, 151, directly in point. See also *Toyota v. Hawaii*, 226 U. S., 184, and also the notes in 51 L. R. A. (N. S.), 40, and Ann. Cas., 1915-B, 816.

STATE BONDS—PREMIUMS

April 14, 1923.

MESSRS. PRICE, WATERHOUSE & Co., *Raleigh, N. C.*

ATTENTION OF MR. J. P. WALSH.

MY DEAR SIR:—Referring to the letter of Hon. Frank Nash, Assistant Attorney-General, of March 31, 1923, this letter has today been called to my attention. I beg to say, referring to paragraph (a) under the title "Second" of said letter, that I am informed by Mr. Lacy, State Treasurer, that the unbroken precedent in his office since he has been State Treasurer is that the premiums from the sales of all State bonds have been covered into the general funds of the State Treasurer; that this has been known to the legislative department of the State Government and to the executive department of the State Government; that at least once, if not more often, the Legislature has made an appropriation to a State institution upon being informed that the premium paid on the sale of bonds and covered into the general funds of the State Treasurer was more than adequate to take care of that particular appropriation.

In nearly all, if not all, of the acts authorizing the issue of State Bonds, the Legislature has prescribed an amount payable to the several institutions for whose benefit those bonds are issued, and this distribution is always based upon the face amount of the authorized issue. In practically all of the acts authorizing the issue of State bonds, the cost of the issue is a charge against the general fund in the State Treasurer's office. Occasionally acts have been prepared, directing the payment of the cost of the issue of the bonds out of the proceeds of sale, but the general rule is otherwise. It is my opinion, therefore, that the premium arising from the sale of notes or bonds should be covered into the general fund of the State Treasurer, in accordance with the long continued precedent, unless a different disposition is especially made in the act authorizing the issue of bonds. I do not recall any such special provision.

I know that this question has arisen more than once, and the matter has been discussed in meetings of the Governor and Council of State, and this precedent prevailing in the office of the State Treasurer as to the disposition of the premiums of bond sales and note sales has been observed and has been assented to.

With this modification, the letter of Mr. Nash of March 31st meets my approval.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ANNUAL APPROPRIATION—BOOK

April 18, 1923.

MISS CARRIE L. BROUGHTON, *State Librarian, Raleigh, N. C.*

DEAR MISS BROUGHTON:—C. S., sec. 6577 authorizes the trustees of the State Library to sell, on such terms as they may deem proper, any volume printed under the provisions of this chapter that may not be reserved for the use of the public libraries. Acting under this authority, the trustees

of the State Library have sold books from time to time and have now in the State Treasury a fund unexpended—the proceeds of these sales—which is credited to it as part of its book fund.

On September 11, 1919, the Attorney-General (Judge Manning) ruled that the proceeds of such sale could be used by the Library for its book fund. It seems that the fund in the State Treasury was collected at different times and in different years. You ask this office whether or not the rule adopted with reference to annual appropriations—that they are available only during the year for which the appropriation is made—is applicable to this fund. We think it is very clear this rule does not apply to this fund. It is a permanent fund, not arising from annual appropriations made at the biennial periods. It may be greater or less at any time, dependent upon the accident of having sold books at a particular period.

We think, then, that this fund is always available for the trustees for the purchase of books, regardless of the time when it was collected and deposited in the State Treasury; until, of course, the fund is exhausted.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ATTORNEY-GENERAL—SALARY—FEES

April 27, 1923.

PRICE, WATERHOUSE & Co., *Raleigh, N. C.*

ATTENTION OF MR. J. P. WALSH.

DEAR SIR:—The Department of the Attorney-General has no specific appropriation made to it. Its expenses are paid under the general law from the general fund of the State Treasury, upon warrants issued by the State Auditor. Having no specific appropriations, it has no specific liabilities.

As to its revenues, there are none. C. S., sec. 3871 provides:

In all appeals to the Supreme Court of persons convicted of criminal offenses, a fee of \$10.00 against each person who shall not reverse the judgment shall be allowed the Attorney-General, to be taxed among the costs of that Court.

You will observe that as section 3870 is written in the Revisal, when interpreted in connection with section 3871, these fees, nothing else appearing, would belong to the Attorney-General as part of the emoluments of his office. Since, however, the enactment of the Consolidated Statutes, Chapter 11, of the Public Laws of 1921, the salary of the Attorney-General was increased to \$4,000.00. It has been the construction of this office that this \$4,000.00 was intended as full compensation, and consequently, fees provided in the above sections of the Consolidated Statutes go into the State Treasury.

The source from which the fees are derived renders any estimate of the amount of such fees in advance of the collection wholly uncertain. On January 9, 1923 we paid into the office of the State Treasurer \$1,059.53, being the net proceeds of these fees through the Fall Term, 1921. According to our statement, the Clerk of the Court owes the office still \$461.35 for the fees

accruing at the Spring Term, 1922. The Clerk insists that he has not as yet collected this amount in full, and has not settled with this office.

In addition to this amount, the fees accruing at the Fall Term, 1922, are also unsettled. Our estimate is that those fees will amount to something less than \$400.00.

From the wording of section 3871, you will see that the amount of these fees is dependent upon the diligence of sheriffs in collecting costs, and the solvency of sureties upon appeal bonds. For this reason these amounts are uncertain until actually collected.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

INTOXICATING LIQUORS—JAMAICA GINGER

May 4, 1923.

DEAR SIR:—You inquire whether or not the so-called Turlington Act, ratified on March 1, 1923, modifies or affects section 4507 of the Consolidated Statutes. That section declares that it shall be unlawful for any person to sell the compound known as Jamaica Ginger except upon the prescription of a duly licensed and regularly practicing physician. It then proceeds and regulates the manner of giving the prescription. We find nothing in this section which at all conflicts with the provisions of the Turlington Act. It is a special law, enacted to meet a special purpose, and it would require an express repeal by the Turlington Act or one by necessary implication to remove it from our statute books. We think there is no such repeal, and that section 4507 is still in force.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

FISHERIES COMMISSION—EMINENT DOMAIN

May 16, 1923.

HON. J. K. DIXON, *Chairman, N. C. Fish Commission, Morehead City, N. C.*

DEAR SIR:—We have been considering the letter of Mr. Brent S. Drane to the Attorney-General, dated May 8th. In this letter he propounds certain questions to this office.

(1) We think your Commission or the engineer employed by you in the opening of inlets, must first obtain the definite approval of construction plans by the Chief of Engineers of the United States Army and then obtain authority from the Secretary of War before proceeding with the work. under section 9910 of the Compiled Statutes of 1918 (the act of March 3, 1899).

(2) We have been unable to find any statute which authorizes the Fish Commission to exercise the power of eminent domain. In the absence of such authority, we think that where questions of private right intervene, the Commission will have to deal with the owners of such rights by contract. Of course, if there is uncertainty of title, the State's legal right to proceed would be ineffective.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

FOREIGN CORPORATION—DOING BUSINESS

May 19, 1923.

GENTLEMEN:—In reply to yours of May 17th.

You state the following proposition to this office, and request our opinion upon it:

A Massachusetts business trust, which has its offices and a manufacturing plant in Massachusetts, manufactures canned goods and sells its products in the original packages. It contemplates extending its sales by hiring a commission broker, whose residence and place of business is outside your State to travel in your State occasionally and solicit orders from wholesalers and retailers whose places of business are in your State. Such nonresident broker will be paid a commission on the sales negotiated by him. All orders taken by him will be subject to approval and acceptance at the Boston office of the Massachusetts business trust and the goods so sold shipped to the purchasers in your State from the factory in Massachusetts.

Manifestly, this business is interstate commerce, pure and simple, and upon it the State cannot levy an occupation tax nor require the business trust to domesticate in the State. If the broker or agent, however, offers to sell certificates of shares in the trust, such offer would be subject to our Blue Sky law, in the opinion of this office.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—PEDDLERS—SELLING FROM TRUCK

May 28, 1923.

ATTENTION OF MR. W. F. CLAYTON.

DEAR SIR:—In reply to yours of May 25th.

You state in the following case: "A salesman living in the State has cigars manufactured out of this State shipped to him. He places them in a car and goes from store to store, selling the retail merchants and making deliveries at the time of sales. He has no warehouse located in North Carolina from which he obtains his stock, but carries it around in a car.

You inquire upon this whether or not he is liable to the peddler's tax provided in section 45 of the Revenue Act. We think he is so liable. That section taxes the method of sale and not the sale itself, independent of the method. The peddler in the act is defined as any person who shall carry from place to place any goods, wares or merchandise and offers to sell or barter the same, or actually sells or barter the same. We think this cigar seller comes directly within the definition and that he is not selling any article of his own individual manufacture.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—LICENSE—CENSUS

May 29, 1923.

SHERIFF D. B. STAFFORD, *Greensboro, N. C.*

DEAR SIR:—In reply to yours of May 28th.

You put the following question to this office: The U. S. census of 1920 gave Greensboro a little less than 20 000 population. A special census has been taken by the government which now gives you a population of 43,525; by which census shall you be governed in collecting revenue license taxes which are graded according to population?

If you will turn to page 82 of the Revenue Act, the last clause in section 903a is as follows:

The population of cities and towns and other municipal corporations, where the license tax is graduated in this act to the population, the population shall be the number of inhabitants as determined by the last census of the United States Government.

In *State v. Prevost*, 178 N. C., 740, it is said:

The generally accepted rule is that in statutes of this character, classifying the cities, towns and other sub-divisions of the State by population, that the classification unless otherwise specified is to be determined by some official enumeration officially promulgated and in the absence of a State statute appertaining to the subject or some authoritative municipal regulation the Federal census is usually adopted and allowed as controlling. . . . It is apparent that population in this act bears the meaning of enumeration of inhabitants and refers to such enumeration as the law provides to be made.

We do not find in the United States statutes any specific authority to take the census for Greensboro at the time that it was taken. We interpret, then, the designation of section 903a "the last census of the United States Government" as referring to the census of the decennial period. Consequently, taxes are graded in Greensboro by the enumeration of 1920.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

SCHOOLS—REFUNDING BONDS AND NOTES

May 31, 1923.

DEAR SIR:—In reply to yours of May 29th.

Article 23 of the new school code seems to provide two methods by which the outstanding indebtedness created for the necessary expenses for conducting a six months' term may be funded. First, by the issue of notes. As there is no provision made for selling these notes, we have interpreted the act as allowing such notes only upon agreement with existing creditors of the county by which they accepted the new notes so issued in satisfaction of the old, outstanding notes.

The second method is by the issue of bonds. Section 267 enters minutely into the kind of bonds that can be issued and the rate of interest, and how they shall be sold. We understand from your letter that your county proposes to fund its outstanding indebtedness by issuing new notes to the creditors of the county in satisfaction of the old notes in their hands. Both the notes and the bonds are to be serial notes or bonds. The bonds are required to be coupon bonds, and there is no provision in the act for the registration of either the notes or the bonds. We observe in the form that you send that there is a provision requiring the notes to be registered. We do not think the registration would affect the validity of these notes so that you make them serial in character, that is maturing—a certain amount of them—year by year. Nor do we think that attaching interest coupons to these notes would affect the validity of the issue.

Subject to these comments we see no reason why your form would not be sufficient.

We return the papers sent us herewith.

Very truly yours,

JAMES S. MANNING
Attorney-General.

STATE ACCOUNT—AUDITING

June 1, 1923.

PRICE, WATERHOUSE & Co., *Raleigh, N. C.*

ATTENTION OF MR. J. P. WALSH.

SUBJECT: *Unpaid Appropriations for Fiscal Year 1923.*

DEAR SIR:—In reply to yours of May 31st

(1) Are revenues, out of which appropriations for the fiscal year ending June 30, 1923 are made, those for the year 1922, payable in March, 1923, as for example, the income tax, or do they include some part of the 1923 revenues and if so, what part?

(A) Our understanding is that all revenues coming into the office of the State Treasurer on or before June 30, 1923, which are not specifically appropriated to the payment of a particular fund, are in the Treasurer's office to meet general appropriations—it makes no difference whether a part of the proceeds of 1923 taxes or not.

(2) If the income tax payable in March, 1923, is taken up as an asset of the general fund as at December 31, 1922, should not the amount of appropriations for the year ending June 30, 1923, unpaid by the State Treasurer on December 31, 1922, be taken up as liabilities of the general fund as at December 31, 1922?

(A) We are under the impression that we have answered this question definitely before. We think the answer is, Yes; but there should be a note attached, showing exactly the nature of the liability, for as a common sense proposition, the State so far as the appropriations are concerned, is taking money from one pocket and putting it in another.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—TAX VALUATIONS

June 5, 1923.

DEAR SIR:—In reply to yours of June 1st.

We think a town must accept the valuations put upon property by the assessing officers of the county. The only instances in which boards of aldermen and boards of commissioners may make independent tax assessments are those described in section 28 of the Machinery Act—that is, towns lying in two or more counties. This ruling is based upon the assumption that you have not charter authority expressly given to make independent assessments.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

JUSTICE OF PEACE—SPEEDING PROSECUTIONS

June 9, 1923.

DEAR SIR:—The file of papers sent by you to Governor Morrison on June 7th has been by him referred to this office for reply.

On July 14, 1921, Mr. ——— sent to this office a copy of the formal notice sent to you, and we replied as follows:

It seems that the notice which you give speeders is for their benefit. I see no illegal act in such a course of action. Of course, a notice of this sort would not be a legal foundation for a judgment against the defendant. After such notice, though, he may waive further proceedings by sending the fine and costs, as you suggest.

It is entirely obvious that this notice is for the benefit of the alleged speeder. Of course, it is possible for a justice of the peace, relying upon the well known disinclination of those charged with speeding upon the public highways to attend trial, to abuse the situation by taking to himself excessive costs. There is only way by which this danger may be entirely eliminated, that is to instruct the justice of the peace to omit giving these notices and to issue a warrant against the alleged speeder upon proper affidavit made by the officer having such matters in charge.

We shall be forced, then, to notify Mr. Cates that his procedure in issuing these notices is not provided for by the law and that he should in all cases issue a warrant and give defendant therein an opportunity to attend trial and introduce evidence as to the fact of speeding, if he so desires. This, of course, involves the necessity of sending the warrant at times to another county, of arresting the defendant therein by the officials of the county of his residence, and carrying him to the county in which the warrant was issued, or permitting him to give bond for his appearance before a justice of the peace at the time fixed, when and where he should have a proper trial. This is the legal course, however inconvenient it may prove to all parties concerned.

Of course, a justice of the peace is entitled only to those fees provided by the statute. If he should charge more, and do so wilfully, he would be guilty

of extortion. Whether or not Mr. C. has charged more by way of fees than the statute allows, we do not know. Of course, if he should be using his office for the purpose of extorting illegal fees from defendants, whether innocent or not, he would be subject to indictment.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

CITIES AND TOWNS—SPEEDING

June 11, 1923.

DEAR SIR:—In reply to yours of June 9th.

It seems to us that twenty miles an hour in the residence portion of any city or town, and thirty miles an hour on the country road is a liberal allowance of speed for motor vehicles. Improved roads throughout the State, particularly near the larger cities, are being crowded with such vehicles and each one of them which exceeds the liberal speed allowance is a source of danger to all the others. To administer the law properly involves many elements. Some two years ago we wrote a justice of the peace in Burlington N. C., who had prepared one of these forms of notices to speeders, as follows:

It seems that the notice which you give speeders is for their benefit. I see no illegal act in such a course of action. Of course, a notice of this sort would not be a legal foundation for a judgment against the defendant. After such notice, though he may waive further proceedings by sending the fine and costs, as you suggest.

We are aware of the fact that the use of these notices may be abused by unscrupulous officers, yet there is always a remedy for the defendant charged with speeding. He may demand that the warrant be issued against him, attend the trial, and have the question of speed determined judicially. If he is not content with the magistrate's judgment upon such hearing, he may appeal to the Superior Court.

The town of Garner is a small town, just east of Raleigh. The hard surfaced highway runs through it. We have no doubt that drivers of automobiles in passing through the town lose sight of the limit of twenty miles and keep in mind only the thirty mile limit, in many instances. This office has no authority to control the discretion of the mayor of the town in enforcing the speed laws applicable to that town. If the costs charged up against the defendant are wilfully made larger than the statute allows, then, of course, the official would be guilty of extortion. Judging from the sample notice enclosed in your letter, the mayor has charged only the statutory fees. He has imposed a fine of \$5.00 in addition to this cost, when he might, if he chose, have imposed a fine of \$50.00 or punishment of thirty days' imprisonment for exceeding the speed limit in the town. Whether or not the person charged with the speeding has really exceeded the speed limit is a question of fact, to be determined by the court upon the evidence introduced before it. The public's interest in controlling the speed of motor ve-

hicles on public highways must under all circumstances be made superior to the convenience of the particular driver of the speeding machine.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

CITIES AND TOWNS—SCHOOL DISTRICTS

June 11, 1923.

DEAR SIR:—In reply to yours of June 7th.

The Hendersonville school district created by Chapter 118, Private Laws, 1911, seems to have issued bonds to increase the school facilities. The fact, then, that the General Assembly at the special session 1921 drew in the boundaries of the town of Hendersonville so that the whole of the school district was not thereafter included in the corporate limits of the town, would not affect, we think, the question of taxation in the district as it is. The town commissioners of the town of Hendersonville may still levy the taxes in this territory outside of the town, the authority to levy it having been given in Chapter 118 above referred to, and not having been modified by the change in the boundaries of the town. It follows from this that the inhabitants of the part cut off from Hendersonville may still send their children to the school in Hendersonville without paying any tuition.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

SPECIAL ELECTION—SELECTION OF CANDIDATE

June 15, 1923.

MR. T. B. WARD, *Chairman, Executive Committee, Second Congressional District, Wilson, N. C.*

DEAR SIR:—In 1919 Congressman Yates Webb tendered his resignation to the Governor of the State as representative in Congress from the Ninth District. At that time this office investigated thoroughly the question of whether or not the primary act provided the machinery for the nomination of candidates in special elections. The Attorney-General's ruling at that time, November 8, 1919, was as follows:

I find nothing in the primary act, P. L. 1915, Chapter 101, or in any part of its amendments since, which provides for a primary to nominate candidates to fill a vacancy caused by the resignation of a congressman. Probably the Legislature from design omitted such provision. There being the omission, however, in this regard, it is evident that the existing party machinery will have to be invoked to nominate a candidate for each of the parties. I am informed that the Governor has fixed December 16 as the date of the election, and is issuing his proclamation to that effect today.

It seems from what you say that the Executive Committee of the Second Congressional District is unwilling to undertake to nominate a Democratic

candidate for Congress to fill the vacancy caused by the late lamented death of Hon. Claude Kitchin, and you inquire of this office whether such candidate may legally be nominated by any other plan.

A reexamination of the primary act, C. S., secs. 6018, et seq., confirms our former view that there is no machinery provided therein by which a candidate may be selected for special elections. Consequently a legalized primary is out of the question. There may be, with the approval of the executive committee and the various candidates who propose to offer at such primary, a voluntary primary in which the expense of the primary would be assessed upon the candidates themselves. The practical difficulties in the way of such a scheme are so great that, they too, may be put one side.

The only other scheme by which a nomination may be secured in that district is for its executive committee to call a convention of the voters of the district, to be held at a certain time and place, to nominate such candidate. The executive committee under the rules of the Democratic party as we understand them, will have authority to prescribe the rules and regulations by which delegates would be selected to this convention. There is nothing in the election law which would prevent this scheme from being legal. It is not, of course, incumbent upon this office to determine whether such plan would conflict with the rules and regulations adopted by the Democratic party for the control of its party machinery.

Recapitulating, then, in our opinion there are only three methods by which this candidate may be selected: first, by the vote of the executive committee, and second, by a congressional district convention to be called by the congressional executive committee of the Second Congressional District, and third, a voluntary primary.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

APPROPRIATION—BLIND SCHOLARS

June 15, 1923.

MR. G. E. LINEBERRY, *N. C. School for the Blind, Raleigh, N. C.*

DEAR SIR:—Chapter 152 of the Public Laws of 1921 appropriates \$2,000 annually to enable the N. C. School for the Blind to extend aid to blind scholars who desire to pursue any course of study, profession, art or science in any university, college, or conservatory of music, which shall be approved by the board of directors of the N. C. School for the Blind. Of this appropriation, however, no one student shall receive more than \$200 in any one year. It is seen from this that the annual fund available for this purpose is small. The evident intention of the Legislature, then, was to enable the directors of the School for the Blind to appropriate this \$200 annually for aiding scholars who had shown special aptitude in a particular study, profession or art.

You inquire of this office whether or not in our opinion this fund is available to an individual coming within the class for whose benefit it was provided, to attend the summer school at the University, independent of whether or not this summer school attendance was a continuation of a regular course

at the University or a preparation for a regular course at the fall term 1923. We think not. We think the Legislature intended this fund for the benefit of blind students who intend to take a full course at some university or college in the State and not a mere fragmentary attendance at a summer school.

If, however, the attendance at the summer school is a continuation of a course of studies at the term just ended, or a preparation for a course of studies at the coming term, we think that your board could legitimately appropriate a pro rata part of the \$200 annual fund to aid the student at the summer school, the fund to be prorated according to the time spent at the summer school. This would result, of course, in decreasing the amount available for the student during the coming fall term of the college, if he is taking the course in preparation for entrance at the fall term.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COTTON WAREHOUSES—INSURANCE

June 16, 1923.

MR. JAMES P. BROWN, *State Warehouse Superintendent, Raleigh, N. C.*

DEAR SIR:—We have considered the letter of Mr. L. J. Mewborn to you in regard to warehouse storage charges upon certain cotton stored in Kinston Bonded Warehouse. The Kinston Bonded Warehouse was destroyed by fire on April 23, 1923. The fifty-six bales of cotton involved were stored in the warehouse, twenty-six bales on November 21, 1922, and thirty bales on November 22, 1922. It is obvious from this that the cotton had been stored in the warehouse at the time of the fire, five months and two and one days. The receipts for the cotton, executed in pursuance to the statute, contained the following provision:

The undersigned local manager claims a lien on said cotton for charges, advances made and liabilities incurred as follows:
storage and insurance from the date of receipt at the rate of
— cents per bale per month or fractional part thereof.

In this case there were five full months and a small fractional part of another month. Under the plain terms of the contract, we think the local manager was entitled to charge the full month's rate in addition to the five months undisputed, though the warehouse was destroyed by fire only two days after the commencement of the six months. Mr. Mewborn's illustration in support of his contention that he is liable for nothing more than the five months' charge is a little unfortunate. At common law the lessor was entitled to rent for the premises although the house was destroyed by fire during the term and was not rebuilt by him, unless there had been incorporated in the lease a contract to meet this situation. Our statute, C. S., sec. 2352, has modified this harsh rule to some extent, but this modification

sustains the view we take of the contract here. The section is too long to state it in full.

We return herewith the file of papers in the case.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—ORDINANCES—STATE LAW

June 21, 1923.

DEAR SIR:—In reply to yours of June 20th.

The State law regulating the operation of motor vehicles is contained in C. S., secs. 2614, et seq. The town of Newport has no authority to enact ordinances which conflict with the general State law, but the officials of the town have the clear right to enforce the State law within the corporate limits. Your ordinance regulating the speed of motor vehicles in the town of Newport is void as in conflict with the State law. We think the fact that the State Highway Commission has taken over a street in your town as part of the State highway system does not affect the authority of the town to enforce the statutory speed regulations within its corporate limits. If you have not done so, you should place along this highway a sign notifying the traveling public of the corporate limits of the town. A stop watch is not essential in order that the speed of a particular motor vehicle while running through the town should be determined. As evidence, the use of the stop watch, of course, would strengthen the case of the prosecution. There is great room for difference of opinion in estimating the speed of a motor vehicle without a stop watch, so it is always well to have one if possible.

The act of the recent Legislature which goes into effect July 1, 1923, applies to all railroad grade crossings where they are on a public highway, regardless of whether or not it is a part of the State highway system. The railroads are required by this act to erect a stop signal.

We think this answers all your questions.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STOP, LOOK AND LISTEN ACT—JURISDICTION

July 2, 1923.

DEAR SIR:—In reply to yours of July 2d.

A grade crossing is where a public highway crosses a railroad without going above or below it. I cannot imagine why the railroad did not erect the notice required at the depot crossing in your town if that is the crossing of a public road. The reason a justice of the peace does not have jurisdiction of the offense is that the punishment is in excess of the punishment that can be imposed by a justice of the peace. A justice of the peace may impose a fine to the extent of \$50.00 or imprisonment for thirty days. He cannot impose a fine and imprisonment, it makes no difference how small the fine or how short the period of imprisonment. When, therefore, this act declares that any person convicted of a breach of its provisions shall be

fined not more than \$10.00 or imprisoned not more than ten days, *or both*, it permits the court to both fine and imprison the offender. This a justice of the peace cannot do.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ATLANTIC & NORTH CAROLINA RAILROAD—LEASE

July 16, 1923.

DR. JOS. F. PATTERSON, *New Bern, N. C.*

DEAR SIR:—It seems from statements made by you in your letter to this office and also those made by Mr. W. F. Evans, attorney of the Atlantic and North Carolina Railroad, that piers belonging to this railroad which had been leased to the Howland Improvement Company in connection with the other property of the railroad on September 1, 1904, which lease was assigned to the Norfolk and Southern Railway Company, were destroyed by fire. The Norfolk and Southern Railway Company subsequently obtained from the insurance companies money as indemnity for such destruction by fire. You ask the opinion of this office whether or not the Norfolk and Southern has the legal right to divert money so received as insurance against the destruction of these piers to the erection of the new passenger station at Kinston, N. C.

We think it quite clear that the railroad company has not such authority under the covenants contained in the lease. The particular part of the lease which is applicable to the situation is the following:

And the Lessee doth further covenant to and with the Lessor, its successors and assigns, that it will keep the said railroad, roadbed, superstructure, depots, buildings, houses, shops, engines, cars, fixtures and other property of every kind and part thereof, so hired, let, farmed out, and delivered, in equally as good condition and repair as the property is at the date of this lease, or to keep in the place of the same like things of equally good condition and repair; and to return at the end of the said term or at other termination of the said lease, to the Lessor, its successors and assigns, the said railroad, roadbed, superstructure, depots houses, buildings, shops, engines, cars, fixtures and other property, and all and every part thereof, in like good condition and repair, or other property when any part of said property shall be worn out, destroyed, or abandoned, as good in quality and substance and in like good order and repair. The condition of the said railroad and property under this provision to be ascertained by examination and inspection by experts or their umpire, as hereinafter provided.

It is obvious from this, taken in connection with the covenant that a fair valuation and inventory was taken before the first day of January after the lease, which inventory must be finally established, kept, recognized and acted upon at all times, and the further provision that a similar inventory was to be taken the first week in October of each year during the continuance of the term if the lessor should so require, the railroad company must

at all times during the term keep the property in equally as good condition as it was at the time of the lease, and any failure to do so would be a breach of the covenants contained therein. Immediately upon the destruction of the piers at New Berne there was imposed upon the railroad company the obligation to replace them with piers in as good condition as those destroyed. The requirement of the lease that the lessor was to keep all warehouses, depots, offices, shops and other buildings now erected and used and necessary to the operation of such railroad, insured, was to provide the means through which repairs could be made when such property was destroyed by fire. For the railroad company, then, to take the proceeds of the insurance and divert them to the erection of a passenger station was in itself a breach of this covenant. No doubt the railroad company claims that that part of the above quoted covenant, as follows: "Or to keep in the place of the same like things of equally good condition and repair," would permit it to use this money in the erection of the new station at Kinston. It is, however, in the opinion of this office, perfectly clear that this is not a compliance with this provision. The depot in Kinston is not put in the place of piers at New Bern and the depot at Kinston is not a "like thing" to piers in New Bern. What, then, is the remedy of the lessor in the face of this breach of covenants in the lease? That is provided for in another covenant contained in that instrument, i.e., that which provides for an inventory the first week in October in each year if the lessor shall so require it, and if on the taking of this inventory it appears that the railroad and property leased to the Norfolk and Southern are not in like good condition and repair as provided in the above quoted covenant, then the Norfolk and Southern shall have until the first day of January next after such default to make good the default. In addition to this, the requirement in the lease that the railroad shall deposit adequate securities in the sum of \$100,000 with the State Treasurer meets the very situation caused by the default of the railroad in the particular instance. The lessor, however, in order to avail itself of this fund must obtain final judgment against the railroad for this breach of the contract or lease.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FISHERIES COMMISSION—PRIVATE FISH PONDS

July 23, 1923.

MR. J. K. DIXON, *Chairman, Fisheries Commission, Raleigh, N. C.*

DEAR SIR:—We received your letter of July 18th with enclosures on last Thursday. You ask us to consider the authority of your board (1) To regular private fishing ponds and oyster beds; and (2) The authority of the board to regulate the sluice-ways of the Yadkin River Power Company and to prosecute for past violations in failing to keep open the sluice-ways.

(1) We are in thorough accord with the excellent opinion rendered to your board by Mr. Hamilton, your local attorney. He has covered the ground ably and thoroughly with one exception, to which we call your attention. There may be such a private fish pond as that the authority of the board

could not be exercised to regulate it. For instance: suppose a landowner, on his own land dams a stream too small to be even a floatable stream within the definition of the law, makes a pond on his own land and stocks that pond with fish obtained by himself. Under such circumstances, we do not think that the board has authority to regulate the taking of fish from this pond by the owner. The fish in it as well as the pond itself are the property of the landowner. To attempt to regulate his use of his own land would be extending the authority of the board further than we think the law permits. As illustrating our position: suppose a citizen of the State keeps a pen of pheasants. He having converted this game in this way to his own possession, the ordinary game laws would not apply to him, subject, however, to the exception that the law prohibiting the sale of pheasants within a certain period of time would bind him, although these pheasants were his private property. With this limitation, we think Mr. Hamilton's opinion is entirely correct.

(2) The Legislature itself in C. S., secs. 1975 and 1976 provided the rules and regulations governing the keeping and maintaining the sluice-ways in the Yadkin River and having placed the enforcement of this law in the hands of the Board of Agriculture, it, in the opinion of this office, has provided an exclusive method for compelling sluice-ways in such river. As a consequence, we think your board, except as you invoke the power of the Board of Agriculture, has no authority in the premises.

As the Yadkin River Power Company and its predecessors were incorporated after the Constitution of 1868, the fact that they were allowed to dam the Yadkin River without any sluice-ways would not be important in determining the power of the Board of Agriculture to act in the premises, as under that Constitution all corporations take their charters subject to the power of the Legislature to amend or modify.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—CHAMBER OF COMMERCE

July 25, 1923.

DEAR SIR:—In your letter of July 23d you put the following question to this office: Can the board of aldermen of the city of Goldsboro appropriate \$300.00 annually to the local chamber of commerce, with the understanding that the entire amount is to be used by the chamber for advertising the advantages of the city and community?

In the first place, you must understand that it is not one of the duties of this office to answer questions of this sort. Out of courtesy to you, we make the following suggestions which you may submit to your attorney:

We know nothing, of course, of the specific provisions of the charter of your city and so cannot tell whether or not there is any limitation upon the authority of the governing body of the city therein to make this appropriation. The general law, C. S., sec. 2787, defines the corporate power of cities at large. Sub-section 4 of that section authorizes them to appropriate the money of the city for all lawful purposes. The term "lawful" used there

must involve a public, as distinguished from a private purpose, and a corporate, as distinguished from a general purpose. This appropriation is clearly not an appropriation to a private organization or corporation, for as we understand it, chambers of commerce are organized to advance the commercial, mercantile and civic interests of the cities in which they are located.

The Supreme Court of the United States in *Weightman v. Clark*, 103 U. S., 256, thus defines the corporate purposes:

It must be some purpose which is germane to the general scope of the object for which the corporation is created.

In *Cole v. LaGrange*, 113 U. S., 1, this Court denied the authority of the city to issue its bonds by way of donation to a private manufacturing corporation, however beneficial to the city to the establishment of that industry therein might be. They put the opinion distinctly upon the ground that it was for a private and not a corporate purpose. The numerous previous cases cited in that case show the distinction which that Court draws between private and public purposes.

In *Hackett v. Ottoway*, 99 U. S., 86, the Court declared that the authority to levy taxes for corporate purposes contemplates a tax to be expended in a manner to promote the general prosperity and welfare of the municipality. There, the bonds were issued to raise a fund to be expended in developing the natural advantages of the city for manufacturing purposes, and they were sustained by the Court.

Of course, we must be understood as not expressing an opinion upon the concrete facts in your case, as it would be improper for us to do so. This letter is purely suggestive and advisory to you, and for submission to your attorney.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STOP, LOOK AND LISTEN ACT—CITIES AND TOWNS

August 6, 1923.

DEAR SIR:—The situation described in yours of August 4th seems to us peculiarly one with which the governing authorities of the city should deal under the last proviso of section 2 of Chapter 255, Public Laws 1923, the "Stop, Look and Listen" Act: "This act shall not interfere with regulations prescribed by towns and cities."

We have held that the act does not apply to spur tracks and industrial sidings, so far as motor vehicles are concerned, except when they are in actual, immediate use, so here the town may make any rules or regulations, which under the circumstances are reasonable, in order that that safety of motor vehicles using these crossings may be secured. We think that the above proviso would not be construed so narrowly as to make it apply only to rules and regulations existing at the time of the enactment of the law.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STOP, LOOK AND LISTEN ACT—INDUSTRIAL SIDINGS

August 15, 1923.

DEAR MR. DAVIS:—The Stop, Look and Listen Act is difficult to construe on account of its use of general terms, without dealing with possible limitations. For instance, what did the Legislature mean by "any railroad" in section 1 of the act? Are they broad enough to include a railroad used only occasionally? The word "railroad," while in general use understood to signify a road constructed of crossties, upon which iron rails are placed, and dedicated to public use, *Beasley v. Railroad*, 145 N. C., at 276, from the context of this act must mean something more than this. The main purpose of the act was to protect motorists at the grade crossings of railroads in actual operation. To extend it to the railroads not in actual operation would make its enforcement a great inconvenience to the public, while such enforcement would in no reasonable way tend to secure the safety of motorists. See the discussion in Black Int. Laws, pages 66 et seq., particularly the case in 143 U. S., 457. Influenced by the principles so set out, this office has held that the act of 1923 did not apply to industrial sidings and spur tracks only occasionally used, except when in actual, immediate use. Of course, the Courts may disagree with this ruling, for the conclusion is not free from doubt, as it is based upon a principle not often applied. You can determine for yourself whether it would be safe for you to adopt the plan suggested by you.

Of course, if the position of this office is hereafter sustained by the Courts, there would be no difficulty in your having only the two signs as proposed upon the plat. If the Courts take a different view, you may have trouble.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE INSTITUTIONS—RIGHT OF WAY—PUBLIC UTILITY

August 16, 1923.

MR. H. A. UNDERWOOD, *Constructing Engineer, Raleigh, N. C.*

DEAR MR. UNDERWOOD:—At an interview between Mr. Currie, attorney of the Carolina Power & Light Company, and myself, he presented for my consideration the contract between the State Hospital and his company covering the running of the Power Company's line across the property of the State Hospital. This contract between the two parties thereto was duly executed in 1909. The legal effect of the contract, assuming the authority of the State Hospital to make it, was to confer upon the Power Company the right to erect its towers and to run its lines along a well defined line indicated on a map attached to the contract, and this in legal effect gives the Power Company an easement in fee for that purpose to an extent reasonably necessary to erect said line and to keep it in safe condition. There was no right reserved by the State Hospital in the contract to compel the Power Company to remove its lines when in the enlarged scheme of building the Hospital might encroach upon the easement granted the Power Company.

It seems that in erecting one of the new buildings, and after the construction of it had been entered upon, it was ascertained that when complete, it would approach one of the high power lines of the Power Company at a distance of eighteen inches. This manifestly would be a source of danger to the building itself and its inmates. You inquire upon this, upon which one of the parties to the contract should be imposed the expense of removing the line to such a distance as would do away with danger inherent in its present location. In the absence of an express reservation of authority to the State Hospital in the contract itself, we think this expense under the circumstances would be imposed upon the State Hospital and not upon the Power Company. There is only one provision in the contract which by any possibility and by forced construction could impose this cost upon the Power Company. That provision is as follows:

And it is agreed that the said party of the second part or assigns shall build and maintain said line in a skilful and safe manner and if it shall fail to do so in a reasonable time after due notice given the party of the second part, the party of the first part shall have the authority to put said line and towers in a safe condition and charge the expense of the same to the party of the second part.

We interpret this, however, as requiring the Power Company to construct and maintain its line along the easement granted to it by the State Hospital in a safe and skillful way and to maintain the line so erected thereafter in a safe manner. We think that it does not authorize the State Hospital to encroach upon the right-of-way so as to make the location of the building unsafe, and then require the Power Company to remove the dangerous wires.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATUTE—"JUDICIALLY DETERMINE"

August 16, 1923.

DEAR SIR:—We have held up your letter of August 11th until the return of our stenographer from a well earned vacation.

It seems very clear that the attorneys representing the county school board are right in their contention. The Court has defined the meaning of the terms "judicially determined" as follows:

Power is thus conferred to "canvass and judicially determine the returns"—that is, to examine, scrutinize and inquire about them—to ascertain and declare that what purports to be such returns are or are not such, whether they are defective, if at all, and what their meaning is, and from such as are accepted as true and proper ones, what number of votes were cast, for whom they were cast, and the result of the election in the county, as prescribed by the statute. Power, however, is not thus conferred to make, alter or amend returns. The board must accept and act upon them, if they are sufficient, as they come from the judges of election at the voting places. It is the province of this board to ascertain the results of the election in the county from the returns and only from them, and to declare and proclaim that result. *Peebles v. Commissioners*, 82 N. C., 385.

We think, therefore, that under the new school code, which uses the same terms, the board of county commissioners has no authority to determine the validity of the election; has no authority to sit as a court and hear evidence as to what occurred at the election, and determine thus the qualifications of voters at that election.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL FUND—ATTORNEY'S FEES

August 16, 1923.

DEAR SIR:—In reply to yours of August 15th.

We think the lawyers who defended the school committee and superintendent in a suit brought by a discharged teacher for the balance of her annual salary should have their fees paid out of the fund which would have paid the teacher. For instance, if she was paid in full from the funds of the special tax district, then those funds should pay the lawyers' fees. If she was paid in part from the funds of the special tax district and in part from the general county funds, the attorneys should be paid proportionately from each of the funds.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SCHOOL FUND—PENALTY INTEREST

August 18, 1923.

DEAR SIR:—In reply to yours of August 17th.

Section 88 of the Machinery Act of 1919 in penalizing tax payers for deferred payment of taxes, called the sum imposed expressly a penalty. This office upon this statute held that penalties so collected under the Constitution of North Carolina went to the school fund. Therefore, when the General Assembly rewrote the section in the Revenue Act of 1921, they changed the designation from "penalty" to "interest" and that term has been carried forward in the Revenue Act since. We took this as an express declaration by the Legislature that these increased payments upon deferred taxes were to be taken as interest and not as penalties. In the face of this, it is not proper that this office should hold that this interest was a penalty which, under the Constitution, should go to the school fund. The doubt we have upon the whole question is whether or not the Legislature can declare that which is essentially a penalty, interest, in the face of the constitutional provision and so as to defeat its requirements. In the absence, however, of a decision of the Supreme Court, the matter so far as this office is concerned, stands as above stated.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COTTON WAREHOUSES—COÖPERATIVE ASSOCIATION—INSURANCE

August 28, 1923.

MR. JAMES P. BROWN, *State Warehouse Superintendent, Raleigh, N. C.*

DEAR SIR:—After consideration, we are of the opinion that you will comply with section 17, Chapter 137, Public Laws of 1921 (the Cotton Warehouse Act) by permitting the Coöperative Cotton Marketing Association to insure the cotton under its blanket policy by putting an appropriate rider thereupon. The rider is to be in the following form:

It is understood by all the parties to this contract that all cotton covered by this policy while in any warehouse operated by the State Warehouse Superintendent of North Carolina under and by virtue of an act of the Legislature approved March 7, 1921, and being known as an "Act to provide improved marketing facilities for cotton," shall be insured to the State of North Carolina for its full market value, and in case of loss by fire or other causes represented by this policy and contract, the payment for such loss will be paid to the State Warehouse Superintendent of North Carolina, who shall pay the same ratably to those entitled as provided in section 17 of the act aforesaid.

Of course, a policy to this effect is to be delivered to you.

Very truly yours,

JAMES S. MANNING.
Attorney-General.

R. & M. ACT 1923—PENALTIES

September 7, 1923.

DEAR SIR:—You ask this office to interpret section 81 of the Machinery Act of 1923 (Chapter 12, P. L. 1923) with relation to the discounts and penalties allowed upon the payment of the taxes for the year 1923. The part of the section material to the discussion is as follows:

Unless the board of commissioners of any county shall deem it wise so to do and shall by resolution duly passed at a regular or special called meeting of said board prescribe discounts and penalties for the payment or nonpayment of taxes, then none shall be allowed or assessed. In the event a board of commissioners by resolution duly passed, as provided herein, provide for discounts and penalties, then such discounts and penalties shall be not in excess of the following schedule, to wit: A discount of one-half of one per cent per month upon all taxes paid in the months of October and November, and a penalty of one-half of one per cent per month for the months of February, March and April: *Provided*, the penalty shall not exceed one and one-half per cent: *Provided, further*, that if the commissioners shall pass a resolution providing for discounts or penalties, then such resolution shall not be repealed as to the taxes for the year referred to in said resolution.

In the first place, there will be no discounts or penalties upon the payment of the 1923 taxes unless the board of commissioners of the county shall by resolution duly passed at a regular or special called meeting of the board prescribe discounts and penalties for the payment of taxes. This, then, is a necessary prerequisite for the giving of discounts or levying of any penalty at all. If, however, the board of commissioners does by resolution provide for discounts and penalties, then they may fix such discounts and penalties at less than the following amounts, but shall not exceed those amounts: A discount of one-half of one per cent per month for all taxes paid in October and November, and a penalty of one-half of one per cent per month for the months of February, March and April—that is, one-half of one per cent for February, one per cent for March and one and one-half per cent for April. After the one and one-half per cent penalty is reached, then such penalties cease. Though, therefore, a taxpayer pays his taxes in May, 1923, he is not penalized any more than the taxpayer who pays in April.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COTTON GINS—NUMBERING BALES

September 29, 1923.

MR. B. F. BROWN, *Chief, Division of Markets, Raleigh, N. C.*

DEAR SIR:—In reply to yours of September 27th.

Chapter 167 of the Public Laws of 1923 requires public gins to number distinctly and clearly serially each and every bale of cotton in one of three ways, the second of which is:

Attach a metal strip carrying serial number to one of the ties of the bale and ahead of the tie-lock, and so secure it that ordinary handling will not remove or disfigure the number.

Whether or not the samples which you enclosed in your letter will accomplish this purpose can be determined only by practical test. Any one of them, of course, would do if it could be attached so securely as that ordinary handling will not remove or disfigure the number.

We return them herewith.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COÖPERATIVE ASSOCIATION—DECEASED CONTRACTOR

October 5, 1923.

DEAR SIR:—In reply to yours of October 2d.

This office has heretofore ruled that these coöperative association contracts are personal with relation to the individual making the contract; that upon the death of that individual with the contract outstanding and no damages incurred for a breach of the same before his death, the contract ceases to be operative upon his estate, certainly beyond the first year after the

death of the contractor. The statute vests growing crops in the administrator of an intestate decedent and we think the contract would apply to the year when the crop was in the hands of his administrator, but no further. The solution of the question admits of doubt and it has not been determined as yet by our Supreme Court.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—STOP, LOOK AND LISTEN ACT

October 6, 1923.

RE: *N. C. Crossing Stop Law.*

DEAR SIR:—Your letter of September 30th, relative to the above entitled subject matter, is received. In your letter you say that the city authorities of Wilmington have passed on ordinance, section 2 of which reads as follows:

That said rules, regulations and ordinances shall supersede the provisions of the act of the General Assembly of North Carolina of 1923, known as the "Stop, Look and Listen Act," being Chapter 255, Public Laws of 1923, and said act shall have no application to any railroad crossing mentioned in paragraph one above.

and ask my opinion as to the validity and effect of such municipal action. The only answer I can give to this inquiry is to quote to you section 2 of Chapter 255 of the Public Laws of 1923, as follows:

That every railroad or inter-urban company operating or leasing any track intersecting a public road at grade shall place a sign board, not less than ten feet from the ground on the right side of the road, forty inches by fifty inches, one hundred feet from said crossing, which shall be painted with red lettering to insure warning of the proximity of the crossing and notice to stop said motor vehicles, with the following: N. C. Law—Stop"; provided this act shall not interfere with the regulations prescribed by towns and cities.

It would seem, therefore, from the proviso to the above section just quoted that the Legislature enacted section 2 of the act subject to the regulations prescribed by towns and cities. Whether these regulations should be more drastic than the Legislature suggested in section 2, or whether they would be less conducive to public safety, it would seem to be left to the judgment and wisdom of the governing authorities of cities and towns. It would seem, however, that the Legislature intended at least the protection of the public provided in section 2, and that the regulations adopted by cities and towns should not be interfered with by observing the legislative act. I do not see how there could be an interference with the regulations prescribed by cities and towns unless those regulations were more drastic and required greater care to be observed at railroad grade crossings. I think it is clear

that no power was given to the governing authorities of cities to repeal or attempt to repeal the provisions of the act of the Legislature.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—COAL DEALER

October 24, 1923.

DEAR SIR:—In reply to yours of October 22d.

You state in your letter that you go out and solicit orders for coal and when these orders amount to as much as a carload, you order a car. The car is consigned by the shippers to themselves, with instructions to notify you. You collect the money from the customers, deduct your commissions from the amount and forward the remainder to the shippers.

We think under such circumstances you are liable for the coal dealers tax. The bulk is broken after it arrives in this State. The shippers do not deal with your customers and send the coal directly to them. A case similar to this, *State v. Plummer*, from New Hanover County, was decided by the Supreme Court last week, and that decision would render you liable as a coal dealer under the circumstances.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE NOTES—PUBLIC ACT IN PUBLIC LOCAL VOLUME

October 31, 1923.

MR. E. V. CONNOLLY, *Vice-President, The National Park Bank of New York, New York City.*

IN RE: *Notes of the State of North Carolina issued in anticipation of the sale of bonds authorized by Chapter 162, Public Laws 1923.*

DEAR SIR:—Honorable B. R. Lacy, the State Treasurer of the State of North Carolina, handed to me for reply your letter of October 26th to him, enclosing a copy of a letter of even date of Messrs Doyle & Smith to you, relating to the above subject.

Chapter 162 of the Public Laws of 1923 of the General Assembly of North Carolina, entitled "An act to provide for a bond issue for the permanent improvement of the State's Institutions," authorizes the issue and sale of bonds of the State of North Carolina by the State Treasurer in the aggregate sum of \$10,667,500.00 for the purpose of permanently enlarging the State's educational and charitable institutions, and also provides "that said bonds shall bear interest at a rate not exceeding 5 per cent per annum from date of said issue until paid, said bonds to bear such date as may be fixed by the Governor and Council of State. Interest shall be paid semi-annually on the date fixed by the Governor and Council of State."

At the same session of the General Assembly, to wit: the session of 1923, it passed an act entitled "An act to authorize the State Treasurer by and with the consent of the Governor and Council of State, to borrow money and

issue short term notes therefor in anticipation of the sale of bonds authorized by law," and this act is Chapter 251 of the Public-Local Laws of 1923. I enclosed herein a copy of this act certified by the Secretary of State of North Carolina.

In my opinion this act confers authority upon the State Treasurer, by and with the consent of the Governor and Council of State, to borrow money at the lowest rate of interest obtainable in anticipation of the sale of any bonds authorized by any act or acts of the General Assembly for the purposes for which such bonds are authorized to be issued, and it makes the said notes valid and binding obligations upon the State of North Carolina, and pledges to the payment of said notes the full faith, credit and taxing power of the State, and confers upon the State Treasurer, by and with the consent of the Governor and Council of State, authority to renew said notes from time to time. The rate of interest, date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the Governor and Council of State.

The fact that this act authorizing the State Treasurer, by and with the consent of the Governor and Council of State, to borrow money and issue short term notes therefor in anticipation of the sale of bonds authorized by law, is published and printed in the Public-Local Laws of the session of 1923 and not in the volume entitled "Public Laws" does not affect the fact that it is a public law. This has been decided by the Supreme Court of this State in the case of *Hancock v. Norfolk and Western Railway*, 124 N. C., 222, decided March 21, 1899; reaffirmed in *State v. Patterson*, 134 N. C., at page 615.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COÖPERATIVE ASSOCIATION—TAXATION

October 31, 1923.

DEAR SIR:—Sometime ago it was ruled that the Cotton Coöperative Association should list its cotton on hand May 1st of the current tax year where the cotton was located. It is not to be listed by the individual holders of certificates from the Association.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY—CONVICTS—INDETERMINATE SENTENCE

November 7, 1923.

DEAR SIR:—At the request of Messrs. Wright & Stevens, Attorneys-at-Law, of your city, we are writing this letter to you in relation to the conviction and sentence of Lonnie P. Matthews.

It seems that Matthews was convicted of seduction and sentenced by Judge Sinclair to an indeterminate sentence on the Public Roads of New Hanover County of not less than six months and not more than eighteen months. Messrs. Wright & Stevens state in their letter that a question has

arisen under section 1360 of the Consolidated Statutes as to whether your Board is required to allow deductions for good behavior from the minimum sentence, six months. It is quite clear, we think, that you are not so required. Indeed, we think that the authority of Judges of the Superior Court to impose indeterminate sentences upon convicts before them is limited to those convicts who are sentenced to the State's Prison, C. S., sec. 7738. That section was originally section 19 of Chapter 286, Public Laws of 1917. That chapter is confined entirely to the regulating, treatment, handling, and work of prisoners in the State's Prison. Section 1359, which permits the Judges to sentence to imprisonment at hard labor on the public roads does not provide any indeterminate sentence. It is true, this sentence may be for such term as is now prescribed by law for imprisonment in the county jail or the State's Prison. This, we are of the opinion, does not extend the authority of the Superior Court Judge to impose these indeterminate sentences.

At the same session of the General Assembly, it created a Board of Parole, Chapter 278 of the Public Laws of 1917. By the express terms of that act (section 4 thereof) the action of the State Board of Parole can be invoked in the case of a prisoner who is in the State's Prison under an indeterminate sentence only when that prisoner has been in the State's Prison for the minimum period provided in the sentence. This act was amended in 1919, Chapter 191 of the Public Laws, which required the Advisory Board of Parole to formulate rules for application for pardons or paroles for persons serving on county chaingangs and when such rules have been approved by the Governor, they should be followed and observed by the persons applying for pardons or paroles for prisoners serving upon chaingangs or any other county or local prisons. This is the only provision of the law which refers to county prisoners. All the other provisions relate only to those imprisoned in the State's Prison.

We do not undertake to determine the effect of the sentence of Matthews except to the extent that we think he is not entitled to the deduction for good behavior from the minimum sentence of six months.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INHERITANCE TAX—STOCK IN DOMESTIC CORPORATIONS

November 8, 1923.

DEAR SIR:—It seems that your testator died August 23, 1922, owning shares of stock in North Carolina corporations to the amount of \$178,000.00. You thereupon request a ruling of this office as to whether or not such stock is subject to an inheritance tax under the North Carolina Revenue Act of 1921. It appears also that all the legatees under the will of Mr. Graham are non-residents of the State of North Carolina.

The section of the Revenue Act of 1921 which we think imposes an inheritance tax upon property situated as is the property in question with relation to the State in section 12, which is as follows:

A tax shall be assessed on the transfer of property made subject to tax as aforesaid in this State of a nonresident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such nonresident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated: *Provided*, that nothing in this clause contained shall apply to any specific bequest or devise of any property in this State.

This section is to be construed in connection with section 6, which in specific terms imposes such inheritance tax upon property of the kind in question. Section 12 in reality provides the machinery by which the amount of this inheritance tax shall be assessed. Both these sections are also to be construed in connection with part of sub-section 7th of section 6 of the Revenue Act of 1921, which is as follows:

The words "such property or any part thereof or interests therein within this State" shall include in its meaning bonds and shares of stock in any incorporated company incorporated in this State, regardless of whether or not any such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this state, and the tax on the transfer of any bonds or shares of stock in any such incorporated company owning property and doing business outside of this State shall be paid before waivers are issued for the transfer of such bonds or shares of stock as herein above provided for.

The words "estate" and "property" wherever used in this act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, whether such property be situated within or without this State. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, by statute, descent, devise, bequest, grant, deed, bargain, sale, or gift.

Interpreted in this way, we have no difficulty in ruling that the property of the decedent, shares of stock in North Carolina corporations, is subject to the inheritance tax imposed by the act of 1921 to be computed by the method provided in section 12 hereinbefore quoted in full.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE LIBRARY COMMISSION—QUARTERS

November 14, 1923.

MISS MARY B. PALMER, *Secrétary, State Library Commission, Raleigh, N. C.*

DEAR MISS PALMER:—We have examined the statutes in relation to the authority of the State Board of Agriculture to collect from the State Library Commission one-eighth of the expense of maintaining the Agricultural Building recently completed and in which offices were assigned by the Legislature itself to the Library Commission. As we understand it, this building was erected by appropriations made by the Legislature and devoted to certain specific purposes by that Legislature. Chapter 212 of the Public Laws of 1923 assigns to the Library Commission six offices on the fourth floor of the building and does not impose upon the funds appropriated by the Legislature for the support of the Library Commission any charge for the use of these offices. The funds appropriated by the Legislature for the support of the Library Commission were \$27,500 annually for the fiscal years ending June 30, 1924 and 1925, for the support and maintenance of the State Library Commission—Chapter 163, sec. 22, Public Laws, 1923. In addition to this, there was appropriated \$8,000 for permanent office equipment for the Library Commission's offices, in section 6, Chapter 162, Public Laws, 1923. We do not find in any of these acts any authority to use the funds so appropriated in assistance in the maintenance of the Agricultural Building. We do find in Chapter 162 two sums appropriated by the Legislature, \$100,000 for the completion and equipment of the Agricultural Building, and \$125,000 for an additional story to the building to provide for offices for the Department of Revenue. The latter sum was directed by Chapter 164 to be expended in a different manner, that is, in the erection of an additional building in lieu of providing the additional story. We do not find anywhere any legislative authority imposing upon the appropriation made for the support of your Department a part of the expense of the maintenance of the building. In the absence of such express authority, we do not think it is a valid charge against your appropriation.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

SOLDIER'S HOME—ADMISSION

November 17, 1923.

GENERAL JULIAN S. CARR, *Durham, N. C.*

MY DEAR GENERAL CARR:—Your letter of November 16th, referring to what veterans are entitled to the privileges of the Soldier's Home in Raleigh, and referring particularly to two veterans, one from Scotland County and one from Halifax County, is received.

The statute, C. S., sec. 5128, under the title "Soldier's Home," gives the control and management, as you know, of the Home to directors appointed as prescribed in the statute, and continues in the following language:

It shall establish rules and regulations for the maintenance and government of the Home and shall have entire control and management of it; it shall prescribe the rules for the admission of inmates and their discharge.

You will note from this that the board of directors of the Home are given full power to prescribe rules for the admission of inmates and their discharge. I have no copy of the rules prescribed by the board of directors for the admission of veterans to the Home, but it would seem to me that this matter referred to in your letter is determinable by the rules prescribed. I presume you have a copy of such rules, but I have none here.

You have in mind, I think, a provision of the pension law, which is subsection 7 of section 5151 of the Consolidated Statutes, which declares that no person shall be entitled to receive the benefit of this article (7) who owns in his own right or the right of his wife, property whose tax value exceeds \$500 or who, having owned property in excess of \$500, has disposed of same by gift or voluntary conveyance to his wife, etc. It is undoubtedly true that the primary purpose of establishing the Soldiers Home at Raleigh was to take care of deserving, needy, Confederate Soldiers who served in any North Carolina command during the Civil War, and I assume that the board of directors in prescribing rules for the admission of inmates to the Soldiers Home, kept in mind this primary purpose of its establishment.

Always with my kindest regards for you, and best wishes, I am,

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ACCRETION—ALLUVION

November 24, 1923.

MR. BRENT S. DRANE, *Blair and Drane, Inc., 710-11 Commercial Bank Building, Charlotte, N. C.*

DEAR SIR:—Your letter of November 21st presents a question which involves a great deal of difficulty. We have not been able to get a clear idea of the situation with reference to the position of New Inlet, the nature of the deed the Massachusetts syndicate has, and also the character of the act of the wind or storm by which the original inlet was closed and under which the syndicate claims title by accretion. In consequence, we are moving somewhat in the dark in what we have to say in answer to your question.

As you know, accretion is the increase of real estate by the gradual deposit by water of solid material, whether mud, sand or sediment, so as to cause that to become dry land which was before covered by water. We suppose, without knowing, that the land of this syndicate fronted on the Atlantic Ocean on one side and the Pamlico Sound on the other. We do not understand that New Inlet which was closed by the drift of the sand was on the water front of the land of this syndicate. We suppose also that this drift of the sand closing the inlet was caused by some sudden if not violent storm, that it was not a gradual deposit in such sense that its growth was not perceptible while going on. If these assumptions are correct, we think it quite clear that the filling up of this inlet was not an accretion to the land

which fronted on the ocean, but had one of its boundaries the north side of the inlet. This being true, we think you have a right to proceed in opening the inlet, notwithstanding the claim of the syndicate. If they have a valid claim and propose to enforce it, their proceedings would be an injunction against you as representing the Fisheries Commission. In this they could raise the point if they desired to do so.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY BOARD—TITLE TO SCHOOL SITES

December 5, 1923.

GENTLEMEN:—In reply to yours of December 3d.

Since 1901 the title of the county board to school property must be in fee simple. So far as we are informed, for years it has been the consistent rule in the office of the State Superintendent of Public Instruction that a conveyance in fee, subject to the right of the grantor to reënter and resume the title in case a property ceases to be used for State purposes is not such a conveyance as contemplated by the law. We understand that some years ago quite a number of these conveyances were made, and in carrying out the consolidation of school districts for various counties, the county boards of education were confronted with this difficulty. Of course, where the conveyance was not contrary to law, the title reverted to the original grantor under such circumstances. This being brought to the attention of other grantors, there was an attempt within the personal knowledge of the writer to ingraft upon an absolute conveyance a parol trust, causing the title in property to revert to the grantor.

These conditions have hampered the county boards of education in some instances in carrying out the policy of consolidation adopted by the General Assembly in 1921 and 1923. The case mentioned by you is, of course, meritorious, but we do not see how that can be made an exception to the general rule. The following sections of the new school code (Chapter 236, Public Laws of 1923) throw some light upon the subject: Section 19 and secs. 60, 61, 62, 63 and 64.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

CITIES AND TOWNS—INDUSTRIAL SURVEY

December 6, 1923.

DEAR SIR:—In reply to yours of December 5th.

The questions presented in your letter is difficult of solution, particularly since the decision of our Supreme Court in *Ketchy v. Commissioners of High Point*, 186 N. C., 391 (advanced sheets). In that case the Court held that the city of High Point, even though having legislative authority for it, could not appropriate money for the support of the Chamber of Commerce. Your case is distinguished from this from the fact that it is an expenditure of money by your board in an industrial survey of the resources, etc., of your town.

The purpose for which the money is to be spent by your town is, of course, laudable, and probably would obtain positive results in building up the place. I could not, however, say that this expense was a necessary expense within the meaning of the decisions of the North Carolina Supreme Court. Those decisions seem to limit the terms "necessary expense" to those expenses incurred in enabling the city to carry on the work for which it was organized and for which it was given a portion of the State's sovereignty. The Court, however, seems to recognize that what was not a necessary expense at one time may from the progress of mankind and improvement in governmental facilities, become a necessary expense. It is not entirely clear that the scheme you propose to put into effect is a necessary expense within this definition, but personally, I would be inclined to say that it was, as its only purpose and object is to secure data upon which the governing authorities of the town may legislate for the public welfare. That is clearly a public purpose and an expenditure of money for that purpose is, it seems, lawful. It is very clear, however, that under the decisions of the United States Supreme Court, this expenditure would be for a corporate, as distinguished from a private purpose. Indeed, that Court in *Hackett v. Ottoway*, 99 U. S., 86, held that an expenditure of money similar to that proposed by your town was for a public and corporate purpose, and sustained bonds issued to raise money for that purpose.

You must understand, however, that this is purely advisory, not at all official.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

TAXATION—DRAINAGE DISTRICTS

December 8, 1923.

DEAR SIR:—In your letter of December 5th you say that the county commissioners of Hyde County have levied taxes on the tangible property of the Mattamuskeet Drainage District located in the district, and used strictly in connection with the performance of the duties of that district. You ask our opinion as to whether this property is subject to taxation by the county of Hyde for county and other local purposes.

Previous to Chapter 7 of the Public Laws of 1921, there can be no doubt that this property was subject to taxation just as is the property of all other quasi-public corporations. *Commissioners v. Webb*, 160 N. C., 594; *Spencer v. Wills*, 179 N. C., 175; and *Sawyer v. Drainage District*, *Idem*, 182. Your opinion that it is not subject to taxation must, then, have been based entirely upon Chapter 7 of the Public Laws of 1921. That act was evidently passed with the view of meeting the decisions above cited from the 179 N. C., and perhaps for other reasons concerning the bonds of these drainage districts. They are declared in that act to be political sub-divisions of the State. In order that their tangible property should be exempt from ad valorem taxation, it is necessary to hold either that this act converted those corporations which were before declared to be quasi-public corporations into municipal corporations, or that they were parts of the State Government and, consequently, their property belonged to the State. Section

5 of Article 5 of the State Constitution exempts absolutely from taxation all property belonging to the State or to municipal corporations. If this property, since the act of 1921 belongs to a municipal corporation within the meaning of section 5, then it is exempt from taxation, and also if, being made political sub-divisions of the State, they occupy the same relation to the State as counties do, then their property would be exempt from taxation.

Our understanding is that you gentlemen were appointed receivers of this drainage district by the Federal Court of the Eastern District of North Carolina. That seems in itself a holding that the Act of 1921 did not make drainage districts either municipal corporations or political sub-divisions of the State in the same sense that counties are. We do not see, therefore, how you could maintain exemption from taxation in the instant case without impeaching your own title to hold the property.

A question, then, as broad in its implications and as difficult to determine as the one presented by you, should be left to the courts for final determination. What we have said, therefore, is mere suggestion, instead of an attempt to determine the question itself.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

ACCRETION—ALLUVION

December 12, 1923.

MR. BRENT S. DRANE, *Blair and Drain, Inc., 710 Commercial Bank Building, Charlotte, N. C.*

DEAR SIR:—Your letter of November 26th was received in due time and the reply has been delayed, both by the necessary work in the office and by a desire to make a further investigation. As you know, the accretion to land which would accrue to the benefit of a riparian owner must be gradual and imperceptible. A sudden storm changing the boundaries of his land by throwing sand or other material against it, would not constitute an accretion to that land. We still think that these changes in the bars on the coast of North Carolina are almost invariably caused by a violent storm and the action of the storm closes the inlets, and not a gradual and imperceptible deposit of land upon one boundary of the inlet. If this is true, no one can found a right to the alluvion so suddenly deposited upon this land. It may have been that New Inlet was originally as shown by the red lines upon your map, and that the boundaries of the land belonging to the club were defined in their deed as bounded on the south by New Inlet, and that New Inlet was carried further south—not by gradual action of the waters, but by really the action of storms. Take this as an instance:

Suppose in some storm the original New Inlet as marked out by you should be closed, while in the same storm another inlet further south would be broken in the bar. Certainly the club would not be entitled to all the land running from their former boundary to the new inlet. Even under the law of gradual and imperceptible accretion, they could not attach existing land to their title by any rule of law, unless that land was submerged by gradual action of the winds and sands, and the inlet moved across this sub-

merged land by such gradual movement as to constitute that part attached to the club's land alluvion. In other words, in the particular case, there must have been gradual and imperceptible submergence of the land on the south of the inlet as well as gradual and imperceptible accretion to the land on the north of it.

If you act in opening the new inlet as proposed, we could not, of course, guarantee you against a lawsuit if the club claims all the land for two miles down the bar, but we think you would stand a good chance to win the suit if they did sue you. This is as far as we can go in as intricate and doubtful a matter as that presented in your two letters.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

COUNTY NOTES ANTICIPATING BOND ISSUE—SINKING FUND

December 14, 1923.

DEAR SIR:—You present two questions to this office which will be herein-after stated. It is understood, of course, that nothing we may say in answering these questions is to be taken as authoritative, they not being of such a character as it is one of the duties of this office to answer. What we say, then, is simply advisory and suggestive.

(1) Chapter 403, Public-Local Laws, 1917, authorizes certain townships in Greene County to subscribe for stock in the East Carolina Railway and to issue bonds therefor. An election has been held in one township and a majority of the qualified voters voted for subscription under the act. Upon this you ask whether or not the board of county commissioners of Greene County may execute a note of the county which is to be discounted in some bank in anticipation of the sale of the bonds authorized and receipt of the proceeds from such sale.

It seems very clear that this cannot be done. Section 5 of the above mentioned act expressly prohibits the delivery of any of these bonds until a standard gauge railroad shall have been constructed either from the town of Hookerton or from the town of Maury to the town of Snow Hill. As a matter of fact, such construction has not as yet been entered upon. Section 7 of Article 7 of the Constitution expressly prohibits a county from contracting any debt, pledging its faith or loaning its credit except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein. A majority of the qualified voters in the particular case have authorized this pledging of the credit of the township *only* after the construction of such standard gauge road has been completed. So, if the county commissioners pledge the faith of the county in any other way than that authorized, such pledge would be absolutely void, even in the hands of innocent purchasers for value.

(2) It seems that the county of Greene has issued road bonds under C. S., sec. 3677, has levied the proper tax to pay the interest on those bonds and provide a sinking fund to meet their payment at their maturity. From the proceeds of this tax there has arisen a sum which has been put into the sinking fund to meet the payment of the bonds at maturity. C. S., sec. 3771 deals with the sinking fund and declares it shall be safely invested by the

board of county commissioners. Upon this you inquire whether or not the county commissioners have authority to lend this sinking fund, upon security which renders it entirely safe, to individuals in Greene County. Section 3771 does not forbid this, and we know no general law which does. The only requirement is that the sinking fund shall be safely invested. If, therefore, the taking of such security renders the investment perfectly safe, the commissioners would be authorized to make it.

(3) We concur in Mr. Albritton's opinion as to the authority of the county commissioners to work county convicts on the grading of this road.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

TAXATION—EXEMPTION—BONDS OF COLLEGE

December 18, 1923.

DR. CHAS. E. BREWER, *President, Meredith College, Raleigh, N. C.*

MY DEAR DR. BREWER:—I have your letter of December 17th and replying to it, I beg to say:

Article 5, Section 5, of the Constitution of the State contains this provision, among other things:

That the General Assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes.

and the General Assembly under said article has for many years in its Revenue Act contained the following provision, it being now section 7901 of the Consolidated Statutes:

The following real estate, and no other, shall be exempt from taxation, State and local: . . .

4. Buildings, with the land they actually occupy, wholly devoted to educational purposes, belonging to and actually and exclusively occupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other corporate institutions of learning, together with such additional adjacent land owned by such churches, libraries, and educational institutions as may be reasonably necessary for the convenient use of such buildings respectively; and also the buildings thereon used as residences by the officers or instructors of such educational institutions.

and in the same section the statute provides:

The following personal property, and no other, shall be exempt from taxation, State and local: . . .

3. The furniture, furnishings, books and instruments contained in buildings wholly devoted to educational purposes, belonging to and actually and exclusively used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions.

In commenting upon and construing the above provisions, the Supreme Court of this State said in *Corporation Commission v. Construction Company* (The Hobgood school case), 160 N. C., 582:

In the section of the Constitution referred to, a perusal of the words employed gives clear indication that it is the use to which the property is devoted and the extent of the interest so dedicated which should be regarded as controlling rather than the title or tenure by which it may be held, and while the language of the Constitution is very general in its terms, permitting to some extent of legislative definition (*Ferrell v. Ferrell*, 153 N. C., pp. 174-179), these terms in any aspect of them are sufficiently broad and comprehensive to uphold the legislation applicable to the question presented. The constitutional provision being altogether permissive in its nature as shown in the well considered case of *Congregation v. Commissioners*, 115 N. C., 489, the Legislature may establish the exemption to the full constitutional limit or it may provide for a lesser one. And from this case, and a further perusal of the present statute, it appears that in order to obtain the benefit of the exemption which is established, the property must be devoted exclusively to the favored purpose, and in case of "incorporated colleges, academies, industrial schools, seminaries or other corporate institutions of learning," the real estate exemption is confined to buildings, with the land they occupy, with such adjacent land, etc., which are wholly devoted to educational purposes and which belong to and are actually and exclusively occupied by these institutions, and to the buildings on such land used as residences by the "officers and instructors of such educational institutions." . . . Both in the Constitution and statutes, it is the use to which the property is devoted which is made determinative, and not the presence or absence of consequential pecuniary benefit to the owner or proprietor.

Following the power conferred upon the Legislature by the above quoted section of the Constitution, the Legislature has incorporated this further provision, it being Section 5 of the Revenue Act of the State, and it being section 7768 of the Consolidated Statutes, in the following words:

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States Government, shall be liable to taxation except property belonging to the United States and to municipal corporations and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: *Provided*, that no property whatever, held or used for investment, speculation or rent shall be exempt, other than bonds of this State and of the United States Government, unless said rents or the interest on or income from such investments shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable or benevolent institutions.

The question you desire my opinion about is whether or not the bonds issued and authorized by the Baptist Convention for the benefit of Meredith College and secured by deed of trust or mortgage upon the property to be improved, as well as the property now held in the city of Raleigh by Meredith College, would be exempt from taxation. I do not think that under the Constitution and statutes of this State these bonds would be exempt from taxation. The Legislature under the permissive power given by the section of the Constitution hereinabove quoted exempts the buildings and property owned and devoted to educational purposes from taxation. The buildings, therefore, erected by the proceeds from the sale of these bonds would be exempt, but under this section of the Constitution and the statutes of the State as construed by the Supreme Court, I cannot find any authority or any suggestion that these bonds would be exempt from taxation in the hands of the holders. It is clear, of course, that the bonds would not be held exclusively and devoted exclusively to the use of education.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

REGISTRATION—REFORMATION OF DEED

December 28, 1923.

MR. B. B. DOUGHERTY, *Appalachian Training School, Boone, N. C.*

DEAR SIR:—In the memorandum left here by you, you state that your Institution bought from Mr. Greer one acre of land on which was located a spring; that you fenced this acre and took from Mr. Greer a proper conveyance. Thereafter, Greer sold and conveyed to one Eggers the tract of land of which this acre formerly constituted a part. Greer in this second deed failed to reserve the acre and spring, so the deed purported to convey the tract of land without any exception. Eggers registered his deed before the deed to the one acre was registered by your Institution.

At the time of the execution of the deed to Eggers, the acre and the spring had already been fenced. Eggers now claims title to the spring lot because his deed to the tract of land was registered first. In doing this, he is relying upon section 3309 of the Consolidated Statutes. That section in part declares:

No conveyance of land shall be valid to pass any property as against creditors or purchasers for valuable consideration for the bargainor, but from the registration thereof within the county where the land lies.

It is manifest from this that your institution occupies a difficult situation with reference to this spring lot acre. It is evident, however, that Greer at the time he conveyed the land to Eggers omitted from the deed through mistake the reservation of the one acre theretofore conveyed to your Institution. We suggest that you try to get Greer to bring an action to reform the deed in this particular, the reservation of the one acre having been omitted therefrom by mistake. Eggers could not claim that he had no notice of the claim of your Institution, because the one acre had already been fenced and was in possession of your Institution at the time the deed was made to him.

Notice from the fact of actual possession is imputed to the person dealing with the land and he cannot be heard to say that he did not have such notice. Notice, however, is only material when an action is brought to reform the deed. It would not affect his rights as purchaser for value under the above quoted section 3309.

If Mr. Greer would refuse to bring this action, we suggest that you bring it yourself, making both Greer and Eggers parties to it, and ask a reformation of the deed to Eggers on the equitable ground that that deed omitted the reservation through mistake. It is not absolutely certain that you could bring the action if he refuses to bring it, but there is too much involved in the matter not to test it out, at any rate. If the facts sustain your view, we think it quite probable that the Court would recognize your right under the circumstances of this case, to bring the action.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

HOTEL—BURGLARY BY GUEST

January 21, 1924.

HON. S. PORTER GRAVES, *Wachovia Bank Building, Winston-Salem, N. C.*

MY DEAR SIR:—In reply to yours of January 18th.

This letter will deal with the question whether or not in North Carolina a guest in a hotel who breaks and enters the room of another guest in the hotel, then occupied by that other guest, in the night time with intent to commit a felony therein, is guilty of burglary.

First, we will consider the question of common law, independent of the statute of 1889 dividing burglary into degrees.

Henderson, Judge, in *State v. Langford*, 12 N. C., 253, defines it as follows:

Burglary is the breaking and entering into the mansion house of another in the night time with the intent to commit some felony within the same, whether such intent be executed or not.

Wharton defines the crime, 2d Wharton Criminal Law, 11th Edition, p. 1187, section 966, as follows:

Burglary at common law is the breaking and entering the dwelling house of another in the night with intent to commit some felony within the same, whether the felonious intent be executed or not.

In an earlier edition he stated that whether a guest at an inn is guilty of burglary by rising in the night, opening his own door and stealing goods from other rooms, is doubtful. In the more recent editions he declares, however, "But the true rule is that if the entrance into such other rooms be by opening doors which are shut, this is a burglarious entrance." See section 975. In section 974 he declares broadly that though the entrance into the house may have been through an open door, yet burglary may be committed by breaking into a room then closed within the house.

As early as 1839, the English judges, in *Regina v. Wheeldon*, 34 Eng. Com. Rep., p. 617 (the question was submitted to three judges), held that if a lodger in a house has committed a larceny there, and in the night time even lifts a latch to get out of the house with the stolen property, this is a burglarious breaking out of the house. The prisoner's counsel in that case admitted that if a party went into some other person's room or entered some place where he had no right, he would be guilty of burglary, and attempted to distinguish the instant case from cases such as this—that being a lodger, he had a right of egress which would prevent the breaking out from being burglarious. The court, however, overruled this contention.

In *State v. Clark*, 42 Vt., 629, at p. 635, it is said:

It is insisted that the court erred in refusing to charge the jury that if they found that the respondent was lawfully within the house as a guest, his going from his own room and breaking into Burton's room, etc., would not constitute the crime of burglary. The respondent was in the hotel, a place into which all travelers have a right to enter, certain parts of which are ordinarily appropriated to the use of all the guests in common. Other parts are appropriated to the exclusive use of the landlord or are assigned to the exclusive use of particular guests, and to these parts no other person has the right of entry solely upon the ground that they are guests. If a person so being a guest in a hotel breaks into other parts of the house where he has no right to enter, for the purpose of committing a felony, it is burglary, the same as if he had broken in from the outside.

This decision was written at the January Term, 1870, and Wharton in his later editions cites it as authority for the position laid down by him in section 975, above referred to.

In 9 C. J., p. 1025, the rule is thus stated:

Hotels and boarding houses and houses in which rooms are let to lodgers are undoubtedly dwelling houses so as to make it burglary to break and enter an outer door with felonious intent, *or to enter an open outer door and to break and enter an inner door with such intent.*

It thus appears that even at common law, a guest may commit burglary by breaking and entering a room not assigned to him in the night time with intent to commit a felony. Much more must this be true if this room into which he breaks is then occupied by another guest.

Second, the draftsman of the Act of 1889, Chapter 434 (C. S., sec. 4232), seemed to have in mind the former doubt of Wharton and so drew the North Carolina act as to obviate that doubt:

If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building.

This distinction between a dwelling house and a sleeping apartment is carried throughout the statute and was not in the definition of burglary at common law. There can, then, we think, be no doubt that in North Carolina

the felonious entry and breaking by one guest of a hotel of a room then occupied by another guest, in the night time, is burglary in the first degree.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

APPROPRIATION—FAIR ASSOCIATIONS

January 29, 1924.

MR. GARLAND DANIEL, *Greensboro, N. C.*

DEAR SIR:—In reply to yours of January 28th.

The serious effect of the ruling of this office upon Chapter 159 of the Public Laws of 1923 upon fair associations, particularly upon your own association, entitles you to a full and clear explanation of that ruling. We regret very much the necessity imposed upon us to make the ruling, but there are certain legal principles which we have to follow in advising other departments of the State Government.

The statute permits the State Treasurer, when he has reasonable doubts as to his authority to pay out money from the Treasury, to consult the Attorney-General and to act upon his advice after obtaining the same. He is not required to pay even a warrant unless that warrant is legally drawn and is legally authorized, and he must in the first instance determine whether it is such legal warrant. *Bank v. Worth*, 117 N. C., 147. In pursuance of this, the Treasurer did ask the advice of this office upon Chapter 159. The advice given by this office, however, is not an opinion of a court of competent jurisdiction, but is purely advisory. If, therefore, it should be erroneous, it does not in any way deprive the claimant of his right to resort to the courts to determine whether or not it is an error.

The Constitution, Article 14, section 3, expressly declares that no money shall be drawn from the Treasury but in consequence of appropriations made by law. The term as used in the Constitution has been defined by our own Court as the setting aside of a certain fund to the payment of a liability incurred or to be incurred. The fund, then, must be certain, or upon the face of the act, capable of being made certain. In the latter case, for instance, where the Legislative levies a specific tax and appropriates the proceeds thereof for a particular purpose. Of course, the amount of the appropriation here is uncertain until the tax is levied and collected, but it is unquestionably definite and certain when that is done.

Now, there is nothing in Chapter 159, in secs. 1, 2, and 3, which makes any appropriation at all. On the contrary, section 1 commences:

All appropriations which shall be made for the benefit of agricultural fairs, etc.,

thus manifesting an intention to appropriate a specific sum in some other act. All three of these sections deal with the matter as though the appropriation was to be made thereafter. Section 4 of the act is as follows:

The State Treasurer of North Carolina is hereby authorized and directed to draw his warrants upon the State Treasurer for the money herein appropriated in favor of the several agricultural fairs of this State which shall have complied with the provisions herein set forth.

We have examined the original act and find there was no misprint of the same, but the act as filed is identical with that printed. This section, then, is the only one which lends any force to the view that Chapter 159 was an act carrying an appropriation of money. The legislative history of the enactment of this law shows, we think, that the act was not considered by the Legislature itself as one carrying an appropriation.

The House of Representatives has a rule that all bills carrying appropriations shall be referred to the appropriations committee. On February 13, 1923, Mr. Nimocks, by request, introduced H. B. 681, a bill to be entitled "An act relative to appropriations to agricultural fairs" and it was referred to the committee on agriculture—not to the committee on appropriations. We followed the course of the bill, both through the House and Senate, and found that it was reported favorably by the committee on agriculture, was adopted by the House after such favorable report, went to the Senate where it was referred to the committee on agriculture there, was reported favorably by it without amendment, and passed the Senate and was enrolled in the form in which it is now printed.

Now, to show that this bill was not intended as an appropriation act, we find that on February 14th Mr. Warren of Person introduced a bill, H. B. 738, a bill to be entitled "An act relating to appropriations to agricultural fairs," and this was referred to the committee on appropriations because it carried an appropriation. This bill was reported unfavorably by the committee on appropriations on February 27, 1923, so it does not appear in the Senate Journal.

Such was the legislative history of this act. We, then, advised the Treasurer—though the matter was not free from doubt—that the General Assembly of 1923 in Chapter 159 of the Public Laws of that year, had not made the appropriation required by section 3 of Article 14 of the Constitution upon which he could legally pay warrants drawn upon him for the benefit of these fairs under that act. This, of course, left each fair entitled to \$100.00 under C. S., sec. 4943, as amended by Chapter 72, Extra Session of 1921.

Of course, any agricultural fair association aggrieved by this ruling and thinking that it is entitled to a specific appropriation under Chapter 159, may resort to the courts by a case properly constituted, to compel the State Treasurer to honor warrants drawn upon him under the machinery provided in said act, Chapter 159.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

INTOXICATING LIQUORS—FLAVORING EXTRACTS, ETC.

February 6, 1924.

DEAR SIR:—Your letter of February 5th presents a difficult question upon the wording of the Turlington Act, Chapter 1, Public Laws of 1923. We

do not interpret that act as prohibiting the sale of medicines, flavoring extracts, etc., when they are manufactured under a permit from the Commissioner of Revenue of the United States, under the Volstead Act. There is a certain amount of alcohol necessary to hold certain medicines and flavoring extracts in solution, and that is always an excess of the one-half of one per cent of the statute. The manufacturer, however, of these extracts and medicines may be perfectly innocent, while their sale may offend directly against the act. If any dealer sells either the medicine or the extract to a person, knowing at the time that it is to be used as a beverage, then the dealer would certainly be guilty. If the person who purchases the extract uses it as a beverage and it is found in his possession and he is arrested for drunkenness, then it seems to us plainly under the act the possession of this extract or medicine for beverage purposes would be an offense against the North Carolina law. It is stated in section 2 that all of the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. The act, however, could not have intended to stop the use of proper medicines containing more than one-half of one per cent of alcohol and proper flavoring extracts which also necessarily contain more than one-half of one per cent.

Of course, until the Supreme Court speaks on this question, this is the opinion of this office, based to some extent upon the difficulty of administering the law if any other construction is given to it.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

BOARD OF COUNTY COMMISSIONERS—VACANCY

February 27, 1924.

DEAR SIR:—In response to your inquiry as to whether the resignation of a county commissioner becomes effective before or without acceptance by the board of county commissioners, I beg to say:

You advise me that being one of the county commissioners of Rockingham County, duly elected, and having qualified, you wrote a letter to the clerk of the superior court on the 11th of February resigning as such county commissioner. That on the next day, to wit: the 12th, after reconsideration you notified the clerk that you intended to revoke your resignation. The clerk acting under section 1294 of the Consolidated Statutes appointed your successor, assuming that the filing of your resignation created a vacancy in the office of county commissioner.

The question presented by section 1294 is, when is there a vacancy in the office of county commissioner? There are several apparent cases when there would exist such vacancy, such as the death of the incumbent, the permanent removal from the county or from the State, or an adjudication of lunacy upon proper inquiry or judgment of the court upon conviction of certain offenses. and I take it also where the county commissioner was imprisoned for a period of time for the commission of some offense. In these cases it would seem that no further act by the incumbent was required, but it would be necessary for some board or some tribunal to determine the fact.

The further question arising is, what is the proper tribunal to determine the fact upon which a vacancy arises? It would seem ordinarily that this duty and power resided in the board of county commissioners of which the incumbent was a member. I doubt if such power vests in the clerk of the superior court. His duty and his power is to appoint the successor in the event of a vacancy. The statute does not expressly certainly confer upon him any power to ascertain the fact that the office of county commissioner is vacant.

At common law and under the decision of the Supreme Court in *Hoke v. Henderson* written by Chief Justice Ruffin many years ago, and under a decision on a similar question which was passed upon by the Supreme Court of the United States in which the case of *Hoke v. Henderson* is cited, the power to determine a vacancy or to declare a vacancy rests ordinarily in the body of which the incumbent was and is a member, or in certain cases where the statute confers upon the judge upon conviction of an incumbent of certain offenses to remove him from office, thus declaring the office vacant.

We come now to the question, first, whether or not a county commissioner duly elected and duly qualified by taking the oath and entering upon the discharge of his duty, can resign his office, and if so, what body or what officer acts upon the tender of resignation? I doubt if my official duty requires me to advise you upon this matter and whatever opinion I may entertain, I doubt if it is of any particular value to you in determining this question. This office, however, has adopted the policy that wherever it can properly advise public officers as to the discharge of their duties or as to questions presented in the discharge of their duties, to suggest to them a course which we consider legal.

It would seem that the members constituting the board of county commissioners would have to act upon your resignation and declare your office vacant and notify the clerk of the superior court that the office of county commissioner was vacant, whereupon the clerk appoints a successor. It would seem that the clerk himself has no statutory power to pass upon and determine whether or not the office of county commissioner is vacant but it would seem from the reasoning above outlined that before your resignation became effective it should have been transmitted to the board of county commissioners and it should have been addressed to the board of county commissioners of your county and their action upon your resignation certified by the clerk to the board to the clerk of the superior court.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE INSTITUTIONS—RIGHTS OF WAY

April 26, 1924.

MR. R. S. CURTIS, *Animal Industry Division, State College Station, Raleigh, N. C.*

DEAR SIR:—In reply to yours of April 25th.

You state that the Carolina Power and Light Company is proposing to cross your seventy-two acre tract of State land south of Raleigh, on which

your swine research work is located, with the Wendell-Zebulon transmission line. There is no way under the law by which the Power and Light Company can cross this land except with the consent of the directors of your Institution. The authority for this consent is found in C. S., section 7525, which is as follows:

7525. Grant of easements to public service corporations. The directors of the various State institutions are authorized and empowered to grant privileges and easements to individuals or companies to run telegraph, telephone or power transmission lines over lands belonging to such institutions, when in their judgment it is right and proper to do so, and subject to such terms and conditions as they may impose, and subject in each case to the approval of the Attorney-General of the State.

There is nowhere in any statute that we have been able to find authority given to any public service corporation to condemn land already belonging to the State. Such land has ceased to be private property and has already been taken by the State for public purposes, and for its own uses. Before this land can be condemned, there must be specific authority given by the General Assembly for such condemnation.

Consequently, the Carolina Power and Light Company cannot enter upon this land with a view to carrying its transmission lines across it, without the consent of the board of directors of your Institution.

We do not interpret C. S., sec. 1732 as applicable to the condition outlined by you with reference to this State property. That seems to apply only to State lands vacant and ungranted, and only to railroads.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

MOTOR VEHICLES—LICENSE TAX

May 17, 1924.

GENTLEMEN:—Your letter of the 15th inst. is received.

Section 78 of the Revenue Act of the Legislature of North Carolina at its session in 1923 was construed by the Supreme Court of this State in some of its aspects in the case of *Carolinas Automotive Trade Association v. Cochran, Sheriff*, reported in 186 N. C., 159 filed October 3, 1923; 119 S. E., 9, and the petition to rehear certain phases of the decision was filed and allowed and the opinion of the Court is found in 121 S. E., 5, filed January 22, 1924. These two decisions are the only decisions of our Court on section 78 of the Revenue Act of 1923.

Prior to that time the Court had rendered an opinion in the case of *Bethlehem Motors Corporation v. Flint*, reported in 178 N. C., 399; 100 S. E., 693. This case was carried by writ of error to the Supreme Court of the United States, and you will find it reported in 256 U. S., 421; 65 L. Ed., 1029. The Supreme Court of the United States reversed the decision of the Supreme Court of North Carolina upon the ground that a provision in the old section 78 of the Revenue Act under consideration was discriminatory against foreign corporations. You will find that this discriminatory provision of

the act as it then existed was omitted from the section as found in the act of 1923.

I am advertent to the fact that the statute referred to uses the word "agent." I think this an erroneous and inadvertent use of that word, and so far as I know, it has not been construed either by this office or the officials of the State in a technical sense. The purpose of the statute was, if the manufacturer paid \$500.00 license tax, then that gave the manufacturer the right to select its own dealers in the State, and no other person was authorized to deal in the machines made by such manufacturer. If the manufacturer did not pay the \$500.00 license tax, but this license tax was paid by the State distributor or distributors, then such person paying the \$500.00 license tax would have the right to designate and appoint the dealers in the automobile in the State. In either case, the list is certified to the Commissioner of Revenue and the \$5.00 tax for a duplicate of the license is issued to such persons.

You will find that the matter contained in your question 5 is covered by the decision of the Supreme Court of this State on petition to rehear the Carolina Automotive case, above referred to. The other matters embraced in your questions I think I have sufficiently covered in what I have written you above. If, however, there is any point that I have not made clear to you, I would be pleased to give you such information as I can.

In regard to the matter contained in your question 6, I had a similar question presented to me by the representative of another manufacturer. I told him that in my opinion the easiest way would be for his car being used solely and entirely for demonstration purposes to bear a license number of, for instance, New York, Ohio, or some other State. It was under that license free to travel the roads of this State and would not be molested on its tours; but it was, in my opinion, necessary that the car bear some license number, other wise, its driver would be hailed into court. No car on demonstration tour could be offered for sale or sold in the State until the license tax of \$500.00 had been paid.

You will observe from reading the section that this is an annual tax, and the section provides further:

If at the expiration of a State license issued under this section to any manufacturer or person selling automobiles in the State, for which they have paid the \$500.00 herein provided, it shall have been in force for less than six months, then upon renewal of such license for the following year the manufacturer or person herein described shall be allowed by the State Commissioner of Revenue a rebate of \$250.00 on the new license.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

STATE BOARD OF CHARITIES—VISITORIAL POWERS

May 28, 1924.

HON. JAS. A. LOCKHART, *Law Building, Charlotte, N. C.*

DEAR SIR:—Replying to your letter of May 2d, I beg to say that in my opinion, under section 5008 of the Consolidated Statutes—which I think har-

monizes with Article 11, sec. 7 of the Constitution—the State Board of Charities and Public Welfare have a visitorial power of all penal and charitable institutions of the State. As expressed in C. S., sec. 5008, the State Board shall have the power to inspect county jails, county homes, and all prisons and prison camps and other institutions of a penal and charitable nature. The Mecklenburg Industrial Home, created under the act of 1917, is a penal institution.

I have read the report of Miss Shotwell upon the Mecklenburg Industrial Home. It seems to me the management of that Home ought to feel gratified at such a favorable report. It will be noted that at the close of the report she makes some suggestions as recommendations, and I do not find that they are made other than as recommendations.

You will find also in section 5008 a provision for the requirement of the number, sex, age, physical and mental condition, criminal record, occupation, nationality and race of inmates or such other information as may be required by the State Board.

So, it seems to me clear that the State Board of Charities has the power of inspection, or as it is some times called, the visitorial power, and has power to require reports giving information such as the statute suggests, and other information which it may deem material.

I regret that I have not been able to reply to your letter earlier, but my time has been so fully occupied that I have not been able to reach the matter for consideration until today.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

GENERAL ASSEMBLY—REMOVAL OF MEMBER

June 4, 1924.

DEAR SIR:—Your letter of June 3d is received.

In addition to Article 2, sec. 8 of the Constitution, there is section 22 of the same article, which provides:

Each house shall be judge of the qualifications and election of its own members, etc.

It is clear to me that, having been elected to the House of Representatives from the county of Alamance, and having been at that time a qualified elector of the State, and having resided in that county for one year immediately preceding your election as required by section 8, Article 2 of the Constitution, you have not ceased to be a member of the House because in October, 1923, you removed to the county of Guilford. Removal from the county during the term for which you were elected a member of the House does not disqualify you from holding the membership for the county of Alamance, from which county you were duly and regularly elected.

There are some provisions of the statute which make removal from the county the equivalent to resignation from certain offices, but membership in the House of Representatives is not one.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FOREIGN CORPORATIONS—DOING BUSINESS

August 8, 1924.

MESSRS. WILLIAMS, LOYALL & TUNSTALL, *Counselors at Law, Norfolk, Va.*

GENTLEMEN:—Your letter of August 4th to the Secretary of State was by him referred to this office for reply.

You state in your letter that a Virginia corporation proposes to do in North Carolina a business described by you as follows:

On application of parties in North Carolina for loans, it will lend money to the North Carolina parties secured by deeds of trust upon real estate, taking the bonds or notes of the borrowers as evidence of the money loaned. It is not proposed to have any office or agent in the State of North Carolina, but agents may be sent to North Carolina to discuss and examine into the safety of the security proposed for the loan.

Upon this, you inquire whether our statute requiring the domestication of a foreign corporation to do business in the State (C. S., 1919, sec. 1181) applies. It is clear, we think, that this corporation in the method it has adopted is exercising one of its corporate functions, and that exercise is in practical effect in North Carolina. It is not a single act, but a series of acts which indicate that it is a business in fact. We, therefore, think that it should domesticate in North Carolina before entering upon this business. See *British-American Mortgage Co. v. Jones*, 76 S. C., 218, 77 S. C., 443, and *Chattanooga Nat'l. B. & L. Asso. v. Denson*, 189 U. S., 408.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

FISHERIES COMMISSION—ACT OF 1924

August 19, 1924.

CAPT. J. K. DIXON, *Chairman, Fisheries Commission, Morehead City, N. C.*

DEAR SIR:—You request of this office a resume of the questions presented to it by the Fisheries Commission in relation to the opening of New Inlet.

In the performance of the duties imposed upon it by the statute, the Fisheries Commission determined to reopen New Inlet in Dare County at or near the point where it was located in 1876. This, in the opinion of the Commission, was required both to permit sea fish to enter the sound at that point, and to start the flow of the salt water of the ocean into the sound where the water had become too fresh for proper oyster culture.

Upon investigation, Mr. Drane, the engineer of the Commission, found that in order to make the inlet, a channel must be cut through land claimed by the Pea Island Hunting Club. It seems that the club is the owner of land on the north of the inlet as it was in 1876 through conveyance running back to the original grant from the State. These conveyances call for New Inlet as it was in 1876 as the southern boundary of the land. This inlet through the gradual and imperceptible action of the waves of the ocean had moved south something more than one mile. Consequently, the Pea Island Club claimed the land formed at the site of the old inlet as an accretion to their land. In other words, under the well known rule of law, their southern boundary calling for New Inlet, that boundary follows New Inlet as it gradually and imperceptibly moves south. This claim, without admitting that it was indubitably correct, was founded upon substantial reasons.

The first question presented to this office, then, was: Has the Fisheries Commission authority under the statute to condemn this land in order that the channel might be cut? After thorough investigation and consideration, this office concluded that the Commission did not have this authority. Manifestly, then, if the Fisheries Commission proceeded to open the inlet through the land, the Pea Island Club would have resorted to the courts and enjoined the attempt of the Fisheries Commission to open the inlet at that point. If we assume that they would not have been entitled to a permanent injunction at the final hearing, we know that they would have been entitled to a temporary restraining order, which under the recent act of the Legislature would have been continued, whatever the result in the superior court, until a hearing by the Supreme Court upon appeal. This in the best aspect of it, would have resulted in a delay of from six to eight months in commencing the work.

It was under circumstances of this sort that Mr. Drane saw the officers of the Pea Island Club in regard to the proposed channel, and acting under the advice of this office, entered into a contract with them which allowed the Commission to open the channel without any cost to the State, but required it to retain the dumps (made land) thrown up by it in the course of the excavation to be opened for entry first by the agent of the Pea Island Club. The object was to prevent private ownership of these dumps when they were situated near and in the midst of the holdings of the club itself.

This was the only cost that the Fisheries Commission and the State were put to. The excavation was made, so far as it has been done to the present time, by starting on the sound side, digging the channel under the waters of the sound, throwing the earth so excavated to one side, and thus making these dumps. In the progress of the work, the Fisheries Commission have about reached the land of the Pea Island Club. An inspection of the map made by Mr. Drane of these dumps shows that there are about thirty-seven of them, and, if they are entered in accordance with the provisions of the statute—Chapter 128 of the Consolidated Statutes—it would be necessary to make thirty-seven entries, with thirty-seven surveys, which in themselves would involve cost, expense and delay.

It was under circumstances of this kind that this office was requested to draft the act in relation to a grant of these lands to the resident agent of the Pea Island Club. The effect of that act is to avoid the necessity of

numerous and expensive entries and surveys in order to get a title from the State. It does not in any way impair any of the rights of the State, for this agent of the club is to pay the statutory price of the land. It does not confer any special privilege upon the Pea Island Club. It simply is carrying out in good faith the agreement made by the Fisheries Commission under the advice of this office, in order to avoid the expense and delay of a lawsuit and thus open the inlet before the fall and winter storms, that the adjoining territory might get the benefit of the influx of salt water and the entrance of sea-going fish. It is in reality largely for the benefit of the State and also especially beneficial to the residents of Dare County and of other counties lying upon the sound.

Very truly yours,

JAMES S. MANNING,
Attorney-General.

GENERAL ASSEMBLY—JOINT RESOLUTIONS

August 25, 1924.

DEAR SIR:—In reply to yours of August 23d.

In the matter of the joint resolution relative to the printing of the index to the Consolidated Statutes, authorized by Chapter 86 of the Public Laws of 1923, this resolution is in proper form for joint or concurrent resolutions. Its effect is to amend Chapter 86 of the Public Laws of 1923 in the particular that gives the Secretary of State a discretion to award the contract for printing the index to the Consolidated Statutes to the lowest responsible bidder, and he is allowed if he so finds it necessary, to award the printing thereof to some other printer than the State printers.

Section 2 of the resolution necessarily makes an appropriation from the public funds to pay the expense of the printing of this index. Upon this it is inquired, in the light of sections 21 and 23 of Article 2 of the State Constitution, whether or not this joint resolution is valid. The broad distinction between a joint resolution of two houses and an act of the General Assembly is found in the fact that the former is a mere expression of opinion, whereas, the latter is an act of legislation. In the constitutions of quite a number of states there are prohibitions against legislation by resolution in particulars not necessary to mention in this ruling. In North Carolina, however, there is no prohibition in specific terms. Section 21 referred to above is as follows:

Style of the acts. The style of the act shall be: "The General Assembly of North Carolina do enact."

The Supreme Court has held in *State v. Patterson*, 98 N. C., 664, that an act of the Legislature which has not this provision or style is invalid as offending against the Constitution. The particular resolution is not characterized in accordance with section 21.

In North Carolina, however, there is an express recognition of the fact in section 23, referred to above, that there may be resolutions of a legislative nature:

All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses.

This section, then, recognizes that there may be legislation by joint resolution and that such joint resolution when enacted in accordance with the provisions of this section shall have the force and effect of a law. In the particular instance the joint resolution had the three readings in each house and has been signed by the presiding officers of both houses. Consequently, it is as much a law of the State as though it had been enacted specifically as an act or law of the General Assembly. In this view we are sustained by section 8 of Article 7 of the Constitution. That section declares:

That no money shall be drawn from any county or township treasury except by authority of law.

There is no such prohibition upon the drawing of money from the State Treasury in the narrow sense of the term used in section 8, i.e., a statute properly enacted by the Legislature, though, of course, resolutions of a legislative nature have the authority of law, as above stated, for the drawing of money from the State Treasury.

Very truly yours,

FRANK NASH,
Assistant Attorney-General.

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